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98 427 SEP 11 1998

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No. ____

IN THE

Supreme Court of the United States

October Term, 1997

CHICAGO MILWAUKEE CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a company that is not a rail carrier, possesses no property of a rail carrier, and provides no service of any kind in connection with the transportation of persons or property by rail carrier, nonetheless can be construed to qualify as a railroad "employer" under the federal railroad tax and benefits statutes, even though the plain language of those statutes establishes that the only kind of entity that qualifies for employer status is: (1) a rail "carrier" or (2) a company that is "owned or controlled" by a rail carrier and that also provides services directly relating to "the transportation of passengers or property by railroad."

PARTIES TO THE PROCEEDINGS BELOW

The following entities were parties to proceedings in the court of appeals:

Chicago Milwaukee Corporation
The United States

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Chicago Milwaukee Corporation has never had a parent company or wholly owned subsidiary. In October 1995, the charter of Chicago Milwaukee Corporation as a Maryland corporation was forfeited, and it was deregistered with the Securities and Exchange Commission as of September 10, 1996. Most of the assets of Chicago Milwaukee Corporation have been distributed to its shareholders, and the remaining assets likewise will be distributed to those shareholders as they become liquidated. Chicago Milwaukee Corporation has continued to maintain this action in its corporate name in accordance with Maryland state corporation law. *See* Md. Code Ann., Corps. & Ass'ns § 3-515 (C)(1)-(4) (1995).

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PETITION FOR A WRIT OF CERTIORARI

Chicago Milwaukee Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of petitioner's tax refund claim (Pet. App. 1a-9a) is reported at

141 F.3d 1112. The opinion of the United States Court of Federal Claims dismissing petitioner's tax refund claim on the merits (Pet. App. 10a-48a) is reported at 35 Fed. Cl. 447. An earlier opinion of the court of appeals reversing the claims court's dismissal of petitioner's tax refund claim for want of jurisdiction (Pet. App. 49a-57a) is reported at 40 F.3d 373. The opinion of the claims court dismissing petitioner's claim on jurisdictional grounds (Pet. App. 58a-90a) is reported at 29 Fed. Cl. 777.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1998. Pet. App. 1a. A timely petition for rehearing was denied on June 25, 1998. Pet. App. 91a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 3231(a) of the Railroad Retirement Tax Act, 26 U.S.C. § 3231(a), provides in pertinent part as follows:

> Employer.—For purposes of this chapter, the term "employer" means any carrier (as defined in subsection (g)), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the

> property or operating all or any part of the business of any such employer.... The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended (45 U.S.C., chapter 8), and their State and National legislative committees and their general committees and their insurance departments and their local judges and divisions, established pursuant to the constitutions and bylaws of such organizations.[1/]

STATEMENT OF THE CASE

This case concerns whether the Government can impose "railroad employer" taxes under the Railroad Retirement Tax Act, 26 U.S.C. §§ 3201 *et seq.* (the "RRTA"), on a company that has no involvement whatsoever in railroad operations. The case involves a suit by petitioner Chicago Milwaukee Corporation ("CMC") to recover, on its own behalf and on behalf of 8,445 former employees, more than $11 million in railroad retirement taxes paid in 1985 and 1986. Those payments were made pursuant to a Wage Reduction Agreement

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[1/] The version of Section 3231(a) in effect at the time of the imposition of the tax at issue in this case is identical in all material respects. *See* 26 U.S.C. § 3231(a) (1986).

entered into in the early 1980s by the labor unions representing the employees and the trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (the "Milwaukee"), which had filed for bankruptcy in 1978. Under that agreement, the Milwaukee's employees agreed to a 7% reduction in their wages that would be paid to them later if the Milwaukee could be sold at a price exceeding a certain threshold amount. In early 1985, all of the Milwaukee's rail assets and operations were sold to the Soo Line Railroad Company, and the Milwaukee terminated its status as a rail carrier subject to the jurisdiction of the Interstate Commerce Commission. Thereafter, in October 1985 and September 1986, the Milwaukee's successors—lacking any rail assets or operations—paid the former employees the 7% reduction amount in two installments. The successors also paid railroad retirement taxes on those sums pursuant to the RRTA, which applies only to rail carriers and entities directly connected to carrier operations.

After discovering their error, the successors filed an administrative tax refund claim, followed by a refund suit. The Court of Federal Claims rejected the refund claim, and the Federal Circuit affirmed. The Federal Circuit held that the Milwaukee's successors were railroad "employers" subject to RRTA tax because they supposedly remained under the "control" of the Milwaukee, even though the Milwaukee no longer existed as a railroad. Pet. App. 7a. By construing the RRTA to confer railroad employer status on entities whose only connection to a rail carrier is purely ancestral, the Federal Circuit ignored the plain language of the governing statute and vastly increased not only the number of entities subject to RRTA tax, but also the number of individuals entitled to claim railroad retirement and unemployment benefits.

A. Factual Background.

From the turn of the Century until the late 1970s, the Milwaukee, the predecessor of CMC, was a common carrier railroad that operated nearly 10,000 miles of rail lines. A38 ¶ 1.[2/] On December 19, 1977, after years of substantial operating losses, the Milwaukee filed a petition for reorganization, and the reorganization court appointed a trustee to administer operations. A39 ¶ 2.

As losses mounted, the trustee received permission to enter into negotiations to reduce the pay of the Milwaukee's 8,445 employees. A43-44 ¶ 17. Those negotiations resulted in a Wage Reduction Agreement ("WRA"), which provided that from January 1, 1982 through December 31, 1984, the employees' pay would be decreased by 7%. A44-45 ¶ 19. In addition, the WRA provided that if the Milwaukee was sold, the employees would be entitled to a return of the reduction if the sale price exceeded Interstate Commerce Commission ("ICC") book value for the Milwaukee. A44-45 ¶ 19(c), A65-66 Ex. A ¶ 9(a).

On April 6, 1984, the trustee agreed to sell the Milwaukee's "Rail Assets" to the Soo Line Railroad Company (the "Soo"). A45-46 ¶¶ 22-23. On February 19, 1985, the reorganization court approved the Soo sale and ordered "[t]hat upon consummation of the transactions contemplated by the [sale agreement], all common carrier obligations of the Trustee and [the Milwaukee] be assumed by Soo . . . and shall cease as to the Trustee and [the Milwaukee]." A49-50 ¶¶ 27-28.

[2/] Record references are to the Joint Appendix filed in the Federal Circuit.

By early 1985, it is undisputed that neither the Milwaukee, its successors, nor the trustee conducted any rail operations. A58 ¶ 54. As a result, on April 2, 1985, the ICC determined that it no longer had general jurisdiction over the Milwaukee, ruling that the Milwaukee "is no longer a railroad." A52 ¶ 33, A185.

Although the sale of the Milwaukee's Rail Assets was consummated on February 19, 1985, the actual purchase price remained subject to further negotiation. A53 ¶¶ 37-38. By October 1985, however, the trustee determined that the former Milwaukee employees were entitled to 66% of the WRA pay reduction. A53-55 ¶¶ 40-43. On October 16, 1985, the trustee made that payment, but before doing so, deducted RRTA taxes. A54 ¶ 42. The trustee thereafter paid the Government more than $7.3 million for the employer's and employees' shares of RRTA tax. *Id.*; A347 ¶ 16.

During September 1986, the sale to the Soo was finalized and CMC Real Estate, the successor-in-interest of the Milwaukee, determined that the former Milwaukee employees were entitled to receive the remaining 34% of the WRA pay reduction. A57 ¶¶ 48-50. On September 30, 1986, CMC Real Estate made that payment, but before doing so, again deducted RRTA taxes. A57 ¶ 49. CMC Real Estate thereafter paid the IRS more than $3.9 million for the employer's and employees' shares of RRTA tax. *Id.*; A348 ¶ 19.

B. Prior Proceedings.

On July 9, 1992, CMC, which had succeeded to the interests of CMC Real Estate, filed this lawsuit following the Government's failure to act on CMC Real Estate's administrative claim for a refund of the more than $11 million

in RRTA taxes that had been paid. A58 ¶ 53. The action was dismissed for want of jurisdiction by the claims court, but was reinstated by the Federal Circuit. *Chicago Milwaukee Corp. v. United States*, 29 Fed. Cl. 777 (1993) (Pet. App. 58a-90a), *rev'd*, 40 F.3d 373 (Fed. Cir. 1994) (Pet. App. 49a-57a). On remand, the claims court issued an opinion rejecting CMC's claim on the merits. Pet. App. 10a-48a.

CMC appealed, and on April 13, 1998, the Federal Circuit affirmed the claims court. Pet. App. 1a-8a. The Federal Circuit rested its decision on a ground that neither the claims court nor the Government had urged: according to the Federal Circuit, the trustee and CMC Real Estate were RRTA "employers" because those entities were under the "control" of a rail carrier within the meaning of 26 U.S.C. § 3231(a). The Federal Circuit held that although the Milwaukee's status as a rail carrier had terminated long before the payments at issue, the fact that the WRA had been entered into before the cessation of rail operations sufficed to confer RRTA employer status on the trustee and CMC Real Estate: "At least until its former employees received repayment of the wage reduction, the Railroad's control endured." Pet. App. 7a.

CMC timely petitioned for rehearing. After ordering the Government to respond, on June 25, 1998, the court of appeals denied CMC's petition. Pet. App. 91a.

REASONS FOR GRANTING THE WRIT

In holding that the Milwaukee's successors qualified as railroad "employers" subject to the tax provisions of the RRTA, the Federal Circuit adopted a construction of the term "employer" that contradicts the plain language of the statute. Section 3231(a) of the RRTA could not be clearer in providing

that to qualify as an RRTA employer, the entity in question must be a rail "carrier" or a company that is "owned or controlled" by a rail carrier and that provides services directly relating to "the transportation of passengers or property by railroad." Yet, apparently in pursuit of its own views of proper tax administration, the Federal Circuit "construed" Section 3231(a) to encompass entities having no connection whatsoever to ongoing rail service or operations, and the court did so in a way that neither the trial court nor the Government had urged. Review is necessary to conform the result in this case to the plain language of the governing statute.

Review also is warranted because the opinion below decides an issue of substantial importance, and decides it in a way that will have a profound and immediate effect on the entire railroad tax and benefits system. Because the term "employer" is defined identically throughout the railroad tax and benefits laws, the Internal Revenue Service long has endorsed the policy of construing and applying the term railroad "employer" consistently in those statutes. Accordingly, the Federal Circuit's expansive construction of the term railroad "employer" will do more than simply increase the amount of RRTA tax that will be collected; the decision also will make railroad retirement and unemployment benefits available to new classes of individuals who, prior to the Federal Circuit's decision, never would have guessed that they had spent years working for a railroad "employer." Absent correction, the Federal Circuit's decision will impose significant new burdens on the railroad benefits system that find no support in the plain language of the governing statutes.

I. THE FEDERAL CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE STATUTE THAT THE COURT PURPORTED TO CONSTRUE.

The Federal Circuit, apparently propelled by a belief that the payments in question "should" be taxable under the RRTA, reached a result which in fact is directly at odds with that statute. In the process, the Federal Circuit ignored the settled rule that courts must accept and apply plain statutory language and must not depart from "ordinary English" to pursue their own ideas of wise policy. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 38-39 (1996); *see also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("courts must give effect to the clear meaning of statutes as written"). In this case, the plain language of the governing statute stands directly in the way of the decision below in two separate ways.

First, under the RRTA statute, there is no basis for concluding that former or defunct railroad carriers, and companies controlled by former or defunct railroad carriers, fall within the definition of RRTA employer. Section 3231(a) provides that to be an employer, the entity has to be: (1) an actual rail "carrier" or (2) a company that is "owned or controlled" by a rail carrier and that also "operates any equipment or facility or performs any service" in connection with actual railroad operations. Section 3231(a) also provides that a "receiver, trustee, or other individual or body, judicial or otherwise" may qualify as an RRTA employer, but only "when in the possession of the property or operating all or any part of the business of any such employer." 26 U.S.C. § 3231(a). That statutory definition does *not* provide that former rail carriers, or successors to former rail carriers, are employers for RRTA purposes. Nor does that definition remotely suggest that a former rail carrier

may "control" its successors, long after the carrier ceases to operate, as the court of appeals announced in its decision.[9]

Rather than endorse the open-ended form of "transubstantiation" that is the linchpin of the decision below, Section 3231(a) narrowly limits the carriers and successor entities that qualify as RRTA employers. As the express language of the statute establishes, the *only* kind of "carrier" which itself qualifies as an employer under Section 3231(a), or which is capable of exerting "control" over another entity under that provision, is a carrier that is "providing transportation" subject to the Interstate Commerce Act: "For purposes of this chapter, the term 'carrier' means an express carrier, sleeping car carrier, or rail carrier providing transportation subject to subchapter I of chapter 105 of title 49." *See* 26 U.S.C. § 3231(g) (1986); *see also* 26 U.S.C. § 3231(a) (incorporating definition of "carrier" set forth in subsection (g)). In holding that a *former* rail carrier that indisputably is *not* "providing transportation" subject to the Interstate Commerce Act qualifies as a "carrier"—capable of exerting "control" over another entity for

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[9] The practical purpose of Congress's inclusion of the "owned or controlled" language in Section 3231(a) is self-evident: the language ensures that if the function or service is one that could (or should) be performed by a rail carrier as part of its rail operations, then the carrier will not avoid RRTA tax by delegating the function or service to a subsidiary or some other entity within the carrier's control. *Cf. Railroad Retirement Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446, 454 (1946) ("[I]f a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts. It then makes no difference that it is performed by a carrier affiliate rather than the carrier itself."); *accord Livingston Rebuild Center, Inc. v. Railroad Retirement Bd.*, 970 F.2d 295, 298 (7th Cir. 1992). In this case, given that the Milwaukee was out of business at the time of the payments at issue, that purpose plainly was not served by subjecting the payments to RRTA tax.

purposes of Section 3231(a)—the Federal Circuit ignored that express statutory language.[4]

Section 3231(a) also places express limitations on the successor entities that qualify as RRTA employers—limitations that the Federal Circuit simply ignored. Specifically, as noted above, Section 3231 provides that successor entities qualify as employers only "when in the possession of the property or operating all or any part of the business of any such employer," and the "employer" referred to in that clause must itself be a "carrier" or an entity that is owned or controlled by a "carrier" as defined above. *Id.* Thus, contrary to the Federal Circuit's construction of Section 3231(a), some direct connection to a living, breathing rail carrier is required to meet the statutory definition of employer.[5]

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[4] The above-quoted version of subsection (g) was in effect at the time of the tax payments at issue. In 1995, Congress amended that provision in light of various amendments to Title 49 to read as follows: "For purposes of this chapter, the term 'carrier' means a rail carrier subject to part A of subtitle IV of title 49." *See* ICC Termination Act of 1995, Pub. L. No. 104-88, § 304(d)(2), 109 Stat. 803, 944 (1995), *reprinted in* 1995 U.S.C.C.A.N. 944. Because 49 U.S.C. § 10102(5) defines "rail carrier" as "a person providing common carrier railroad transportation for compensation," however, the result would be the same under the former or the current version of 26 U.S.C. § 3231(g). Each refers to an existing carrier that is presently engaged in railroad operations.

[5] That conclusion is borne out by the legislative history of the Carriers Taxing Act of 1937, the predecessor statute to the RRTA. The Senate Report notes that "control" under the above-quoted definition may be exerted by contract, but in the very next sentence, confirms that the definition of employer in the RRTA is intended to include only those "organizations which are intimately related to the transportation of passengers or property by railroad in the United States." *See* S. Rep. No. 818, at 4 (1937). There was no such intimate relation in this case.

Second, the Federal Circuit's decision also effectively reads out of existence another essential requirement of Section 3231(a) that was not satisfied in this case. Although the court concluded (erroneously, as has just been shown) that the trustee and CMC Real Estate were RRTA employers because they supposedly were under the "control" of a defunct carrier, the plain language of Section 3231(a) establishes that mere control by a carrier is not enough. To qualify as an RRTA employer, the company controlled by a carrier also must itself be involved in active rail operations. Again, Section 3231(a) defines RRTA employer in pertinent part as follows (26 U.S.C. § 3231(a) (emphasis added)):

> [A]ny carrier [subject to ICC jurisdiction] and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, *and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad* . . . .

Had the Federal Circuit applied the emphasized requirement, it would have had no alternative but to hold in the favor of CMC and the 8,445 former employees affected by the court's decision, because the parties in this case *expressly stipulated* that neither the trustee nor CMC Real Estate performed any service in connection with the transportation of persons or property by railroad at the time of the payments that were subjected to RRTA tax. A50 ¶ 29.

That the requirement in Section 3231(a) emphasized above is *in addition to* the requirement that the company must be

owned or controlled by a carrier is established by this Court's decision construing the term "employer" in the RRA in *Railroad Retirement Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946). In that case, there was no dispute that the company in question was owned or controlled by a railroad. The *only* question that this Court considered in *Duquesne* was whether (*id.* at 449):

> Duquesne "performs any service" (1) "in connection with the transportation of . . . property by railroad" or (2) "in connection with . . . the receipt, delivery . . . storage, or handling of property transported by railroad."

Under the Federal Circuit's construction of the term "employer," of course, analysis of that question would be entirely unnecessary: the fact that Duquesne indisputably was "owned or controlled" by a carrier would be enough to qualify it as an employer. But the analysis undertaken by this Court *was* necessary, for the simple reason that the plain language of the statutory definition of employer required it.

The mode of statutory "construction" adopted by the Federal Circuit would be patently impermissible in any circumstance—given the duty of the courts to enforce the plain language of statutes without regard to their own views of equity and policy—but is particularly so here because of the special rules governing tax cases. This Court long has held that "[i]n the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." *Gould v. Gould*, 245 U.S.

151, 153 (1917); *accord Royal Caribbean Cruises, Ltd. v. United States*, 108 F.3d 290, 294 (11th Cir. 1997); *Xerox Corp. v. United States*, 41 F.3d 647, 658 (Fed. Cir. 1994); *Security Bank Minnesota v. C.I.R.*, 994 F.2d 432, 441 (8th Cir. 1993). And as this Court confirmed in *Central Illinois Public Service Co. v. United States*, that settled rule of construction has special significance where, as here, the tax obligation involved is the withholding obligation of an employer. As explained by this Court in *Central Illinois*, "[b]ecause the employer is in a secondary position as to any liability for any tax of the employee, it is a matter of obvious concern that . . . the employer's obligation to withhold be precise and not speculative." *See* 435 U.S. 21, 31 (1978). Given the lack of *any* support in the RRTA for the more than $11 million in tax liability imposed in this case, in no sense can it be said that the standard of clarity and certainty established in this Court's prior decisions has been satisfied.[9]

Although the Federal Circuit is alone in departing from the plain language of Section 3231(a) and embracing an exceedingly broad construction of the term railroad "employer," given the circumstances of this case, it makes sense not to await rulings from other circuits. The practical effects of leaving the

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[9] The trial court disparaged CMC's reliance on the foregoing cases—calling it "a last ditch, catch-all argument"—and concluded that CMC was not entitled to invoke the standard of clarity and certainty set forth in this Court's precedents because CMC's predecessors paid the tax before challenging its imposition. Pet. App. 41a-45a. Not surprisingly, the trial court cited no authority in support of its theory that tax statutes will be construed against the Government when the taxpayer refuses to pay, but not when the taxpayer does so. As for the Federal Circuit, it did not even mention the above cases, let alone explain how its result could be squared with the rules they state.

Federal Circuit's ruling in place would be substantial and unfortunate. Many taxpayers would be left in the difficult position of having to decide how broadly to construe new categories of "employers" and "employees" that have absolutely no basis in the statutory text, and thus are impossible to define with any degree of confidence. *Cf. Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 269-70 (1996) (accepting review even though only one circuit had passed on the question at issue); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 94-95 (1991) (same).

Another factor favoring review is the very egregiousness of the statutory construction at issue. On repeated occasions, this Court has granted review to address errors in statutory interpretations even where the circuit courts had been unanimous in ruling on the statutory question at issue. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 961 (1998) (lower courts' approval of 28 U.S.C. § 1404(a) transfers by district judges designated under 28 U.S.C. § 1407 to preside over multidistrict pretrial proceedings); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 169 (1994) (lower courts' approval of private aiding and abetting actions under Section 10(b) of the Securities Exchange Act of 1934); *id.* at 192 (Stevens, J., dissenting) (emphasis in original) (observing that such actions had been upheld "in *hundreds* of judicial and administrative proceedings in every Circuit in the federal system"); *see also Finley v. United States*, 490 U.S. 545, 558 (1989) (Stevens, J., dissenting) (observing that district court practice of exercising pendent party jurisdiction had the support of the "overwhelming consensus of federal judges"). Particularly given the immediate and substantial impact on the administration of the railroad tax

and benefits system that the decision below will have if it is allowed to stand without correction—which impact is described immediately below—review is appropriate to conform the result in this case to the plain language of the statute that Congress actually enacted into law.

II. THE FEDERAL CIRCUIT'S RULING THAT COMPANIES HAVING NO CONNECTION TO AN EXISTING RAILROAD NONETHELESS MAY QUALIFY AS RAILROAD "EMPLOYERS" RAISES AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE ADMINISTRATION OF THE RAILROAD TAX AND BENEFITS SYSTEM.

By concluding that the term "employer" in the RRTA includes companies whose only connection to railroad service or operations is that they are successors to a railroad that no longer exists, the Federal Circuit adopted an exceedingly expansive definition of the term that will have immediate and significant ramifications for the entire railroad tax and benefits system. That construction of the term "employer" has potentially significant implications for three closely related tax and benefits statutes: (1) the RRTA, which the court of appeals construed in this case; (2) the Railroad Retirement Act, 45 U.S.C. §§ 231 *et seq.* (the "RRA"), which sets forth a system of annuity and pension benefits; and (3) the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351 *et seq.* (the "RUIA"), which is the unemployment insurance arm of the railroad benefits system. *See generally Duquesne*, 326 U.S. 446-48; Gill Deford, *The Railroad Retirement Act: A Short Trip Down The Main Track*, 17 Clearinghouse Rev. 90 (1983). Under the latter two statutes, an employee's eligibility for benefits depends on whether he or she has performed service for

an "employer," a term that is expressly defined in each statute in a way that is essentially the same as the RRTA definition. *See* 45 U.S.C. § 231(a)(1) (RRA definition); 45 U.S.C. § 351(a) (RUIA definition).

Because the term "employer" is defined in the same way in the RRTA, the RRA, and the RUIA, the Internal Revenue Service and the courts have endorsed the policy of construing and applying the term consistently across those statutes. *See* Rev. Rul. 77-445, 1977-2 C.B. 357; *see also Atlantic Land & Improvement Co. v. United States*, 790 F.2d 853, 855-56 (11th Cir. 1986); *Railway Labor Executives' Ass'n v. United States R.R. Retirement Bd.*, 749 F.2d 856, 863 n.12 (D.C. Cir. 1984); *Universal Carloading & Distributing Co. v. Pedrick*, 184 F.2d 64, 65-66 (2d Cir.), *cert. denied*, 340 U.S. 905 (1950); *Despatch Shops, Inc. v. Railroad Retirement Bd.*, 154 F.2d 417, 418 (2d Cir. 1946); *City of Galveston v. United States*, 33 Fed. Cl. 685, 704 (1995), *aff'd without opinion*, 82 F.3d 433 (Fed. Cir. 1996).[2] In light of those authorities, the Federal Circuit's statutory construction not only will affect the RRTA, but the RRA and the RUIA as well.

The ramifications of the Federal Circuit's construction of the term "employer," moreover, are profound. By declaring that companies having no present connection to rail operations or service can qualify as railroad "employers," the court did not just increase the number of entities and individuals subject to RRTA tax. The court also expanded vastly the class of entities

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[2] Indeed, this Court in *Duquesne* granted certiorari to resolve a conflict that arose as a result of decisions construing the term "employer" in the RRA and the RUIA: "Since the definition of 'employer' under both Acts was the same, there was presented a conflict in decisions which led us to grant the petitions for writs of certiorari." *See* 326 U.S. at 448.

and individuals who will be able to claim RRA retirement and RUIA unemployment benefits, which are based on years of service for a purported railroad "employer."

Indeed, the effects of the Federal Circuit's decision potentially will extend beyond the railroad tax and benefits statutes to the entire system of railway labor. That is because under the Railway Labor Act, 45 U.S.C. § 151, the term "carrier" is defined in the same basic way as the term "employer" in the railroad tax and benefits statutes. *See Duquesne*, 326 U.S. at 448 (observing that definition of "employer" derived from the definition of "carrier" in the Railway Labor Act). Thus, under the Federal Circuit's decision, employers and employees with little or no connection to railroads may now find themselves subject, for the first time, to the distinct provisions of law that govern railroads and the individuals who work for them. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (observing that there are "many differences" between the statutory schemes set forth in the Railway Labor Act and the National Labor Relations Act).

The precise effects of the Federal Circuit's decision cannot be calculated with mathematical exactitude, of course, but one thing is certain: the Federal Circuit's expansive construction of the RRTA at the very least will undermine the basic structure of the railroad tax and benefits statutes, which in effect ratify a carefully drawn set of compromises reached between representatives of railway management and labor more than 60 years ago. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 190-91 (1980); *Duquesne*, 326 U.S. at 451; *see also Hearings on H.R. 6956 Before the Committee on Interstate and Foreign Commerce, House of Representatives*, 75th Cong., 1st

Sess., at 11 (1937) (Statement of George M. Harrison, Brotherhood of Railway Clerks); *id.* at 82 (Statement of R.V. Fletcher, Association of American Railroads).[9]

Moreover, in addition to frustrating the statutory scheme agreed to decades ago, the Federal Circuit's decision will have a direct impact on the entire railroad tax and benefits system, now and in the future. In that regard, the Railroad Retirement Board's periodic assessments concerning the system's financial integrity and the need for tax rate adjustments and similar changes are based on the Board's assumptions about the number of individuals in the system who work for railroad "employers." *See generally* Railroad Retirement Board, *Annual Report on the Financial Status of the Railroad Unemployment Insurance System Required by Section 7105 of the Technical and Miscellaneous Revenue Act of 1988* (June 1998); Railroad Retirement Board, *Twentieth Actuarial Valuation of the Assets and Liabilities Under the Railroad Retirement Acts as of December 31, 1995* (August 1997). By vastly expanding—unilaterally and without any statutory basis—the statutory definition of "employer," the Federal Circuit has rendered the Board's assumptions subject to comprehensive re-assessment and thereby has threatened the stability of the system.

The foregoing ramifications are well summarized in a decision that Judge Posner wrote for the Seventh Circuit, in which that court rejected a similar attempt by the IRS to expand

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[9] The relevant portions of the definition of the term "employer" have remained the same since 1937, when railroad management and labor jointly and successfully proposed that Congress pass laws ratifying the agreement they had reached. *See id.* at 1.

the statutory definition of the term "employer" to include new categories of entities (*Standard Office Building Corp. v. United States*, 819 F.2d 1371, 1380 (7th Cir. 1987) (citations omitted)):

> Another consideration is that statutes governing railway labor, including the retirement acts, operate essentially to ratify compromises reached between the railroads and the railroad unions. The IRS's new position threatens to upset that compromise by bringing a new group of workers into the railroad pension system, though apparently no one connected with the industry wants them to be there. A final, related consideration is that since an employee whose wages are taxable under the Railroad Retirement Tax Act is entitled to a railroad pension (because the statutory definitions of covered employer are identical under the Railroad Retirement Act and the Railroad Retirement Tax Act), the position taken by the Internal Revenue Service might expand entitlement to such pensions beyond the scope that the Railroad Retirement Board, which administers the railroad pension system, has seen fit to insist on. No one seems to know whether the additional taxes that would be collected from employers and employees would be sufficient to fund the pensions to which the newly covered employees would be entitled and, if not, what the implications would be for the fiscal integrity of the program.

Absent immediate correction, the Federal Circuit's decision could disrupt and alter the entire railroad tax and benefits system in a way that is detrimental to the effective operation of that system, and contrary to the manifest intent of Congress, as reflected in the plain statutory language that it enacted. Given the system's precarious position, Congress has been forced in

the past to respond with legislation designed to protect the system's financial integrity. *See, e.g.*, Railroad Retirement Act of 1974, Pub. L. No. 93-445, 88 Stat. 1305 (1974), *reprinted in* 1974 U.S.C.C.A.N. 1488; Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, 97 Stat. 411 (1983), *reprinted in* 1983 U.S.C.C.A.N. 411; *see also Fritz*, 449 U.S. at 178-79 (upholding constitutionality of 1974 Act). It would be strange indeed if Congress were compelled to respond with similar legislation again, not because of circumstances beyond anyone's control, but because a lower federal court saw fit to "construe" a 60-year old statute in a way that threatens to alter fundamentally the system established by the plain language of that statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 11, 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

96-5113

CHICAGO MILWAUKEE CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: April 13, 1998

Before MAYER, *Chief Judge*,* RADER and BRYSON, *Circuit Judges*.

MAYER, *Chief Judge*.

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* Chief Judge Haldane Robert Mayer assumed the position of Chief Judge on December 25, 1997.

Chicago Milwaukee Corporation appeals the United States Court of Federal Claims' judgment, *Chicago Milwaukee Corp. v. United States*, 35 Fed. Cl. 447 (1996), denying the company a tax refund. We affirm.

Background

The parties stipulate the facts. Chicago Milwaukee succeeds the Chicago, Milwaukee, St. Paul and Pacific Railroad (Railroad), a former carrier subject to the jurisdiction of the Interstate Commerce Commission. *See* 49 U.S.C. § 10501 (1982). Facing insolvency in late 1977, the Railroad petitioned the United States District Court for the Northern District of Illinois to reorganize under the Bankruptcy Act of 1898. *See* 11 U.S.C. § 205 (1976) (repealed 1978). The court appointed a trustee (Trustee) for the Railroad, who eventually determined that the Railroad's survival required reducing the employees' wages temporarily. On January 29, 1982, the reorganization court approved a wage reduction agreement among the Trustee (on behalf of the Railroad) and four labor organizations (on behalf of the employees). The reduction agreement reduced all employees' gross taxable earnings by seven percent from January 1, 1982, until December 31, 1984. If the Trustee could sell the Railroad's operating lines for a sufficient price, the employees affected by the reduction agreement would receive from the Railroad's estate up to the amount of the reduction. In particular, the reduction agreement provided:

> In the event of the consummation of a transaction for the sale or merger of all or substantially all of the railroad lines . . ., employees who had wages reduced under this agreement . . . shall be entitled to the return

> of up to the amount by which wages were reduced [as determined by a formula]. . . . [But if] the total consideration does not exceed the ICC book value . . . no employee shall be entitled to the return of any amount by which wages were reduced under this agreement.

On April 6, 1984, the Trustee entered into an asset purchase agreement with the Soo Line Railroad Company and its corporate affiliate, SLRCO, Inc. (together Soo), selling substantially all of the Railroad's rail lines for $148 million plus the assumption of certain liabilities totaling over $300 million. Both parties agreed to adjust this price to account for pre-closing changes in the assets' net value. Writing that "upon consummation of the transactions contemplated by the [asset purchase agreement], all common carrier obligations of the Trustee and [the Railroad will] be assumed by Soo," the reorganization court approved the purchase agreement on February 19, 1985, when the Railroad ceased operating as a railroad. Virtually all of the Railroad's employees subsequently began working for Soo, and the Interstate Commerce Commission formally recognized on April 2, 1985, that the Railroad was "no longer operating as a common carrier railroad." However, the Railroad's estate remained liable for the possible repayment of the wage reduction.

Individuals subject to the reduction agreement received repayment of their wage reduction ultimately, but not immediately. The Trustee and Soo disagreed over the adjusted sale price, which likely delayed full repayment of the wage reduction. In the fall of 1985, the Trustee requested that Soo

specify in writing the total downward adjustment it sought. Soo responded in a letter dated October 4, 1985, that it did not seek to reduce the purchase price by more than $50 million. The Trustee determined that even with a $50 million reduction, he could return at least sixty-six percent of the wage reduction. In mid-October of 1985, he paid the workers sixty-six percent of the total wage reduction. On September 12, 1986, the reorganization court approved a settlement agreement ending the dispute over the adjusted price for the Railroad's assets. CMC Real Estate, the Railroad's successor, repaid the remainder of the wage reduction later that month.

Individuals receiving the payments did not "take home" the full amount of the wage reduction. Taxes were withheld. Among those taxes was the Railroad Retirement Tax Act's employee tax, I.R.C. § 3201 (1982 & Supp. II 1984). The Railroad Retirement Tax Act (Tax Act), *id.* §§ 3201-3232, is the railroad industry's analogue to the Social Security Tax Act: it imposes a payroll tax on employers and employees. Revenues from the Tax Act pay pensions and other benefits. *See* Railroad Retirement Act of 1974, 45 U.S.C. § 231 (1994) (pension program): Railroad Unemployment Insurance Act, *id.* §§ 351-367. On October 18, 1985, the Trustee paid employer and employee Tax Act taxes to the Internal Revenue Service. He filed a corresponding tax return with the IRS for 1985 on April 17, 1986. CMC Real Estate likewise remitted the taxes to the IRS on October 3, 1986, and filed a return for 1986 on January 28, 1987.

In April of 1988, CMC Real Estate timely filed administrative claims with the IRS for the refund of the Tax Act

taxes that it and the Trustee paid in 1986 and 1985, respectively. The IRS did not act on CMC Real Estate's claims. So, on July 9, 1992, Chicago Milwaukee Corp., CMC Real Estate's successor, filed this suit in the Court of Federal Claims. The court dismissed the case for lack of jurisdiction. *See* 29 Fed. Cl. 77 (1993); *see* 35 Fed. Cl. at 451-53 (summarizing procedural history). Chicago Milwaukee appealed the dismissal, which this court reversed. *See* 40 F.3d 373, 375 (Fed. Cir. 1994). On remand, the trial court held that the repayment of the wage reduction constituted "compensation" from an "employer" under the Tax Act; thus, it denied Chicago Milwaukee a refund. Chicago Milwaukee appeals.

Discussion

Section 3221 of the Internal Revenue Code (Supp. II 1984) "imposed on every *employer* an excise tax . . . equal to [a] percentage of *compensation* paid during any calendar year by such employer for services rendered to such employer" (emphasis added). This appeal boils down to two primary issues: (1) whether the phrase "paid . . . by such employer" covers the repayment of the wage reduction and (2) whether the repayment constituted compensation.

Resolving the first issue requires addressing the meaning of "employer." We review the trial court's statutory interpretation *de novo*. *See Qantas Airways Ltd. v. United States*, 62 F.3d 385, 387 (Fed. Cir. 1995). In pertinent part, employer:

> means *any carrier* [subject to Interstate Commerce Commission jurisdiction] *and any company which is directly or indirectly owned or controlled by one or*

> *more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad*, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, *and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all of any part of the business of any such employer*. . . . The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation.

I.R.C. § 3231(a) (emphasis added). Congress apparently intended this definition of employer to cover "substantially all of those organizations which are intimately related to the transportation of passengers or property by railroad in the United States." *See* S. Rep. No. 75-818, at 4 (1937). The parties do not dispute that the Trustee was an employer from January 1, 1982, until December 31, 1984, when the workers performed obligations entitling them to possible repayment of

the wage reduction. The Trustee derived his employer status from the Railroad's status as a carrier. Chicago Milwaukee argues that after the Railroad's carrier status ended, neither the Trustee nor CMC Real Estate held employer status. We disagree.

Any "company [that] is directed or incorrectly . . . controlled" by a carrier and that "performs [virtually] any service . . . in connection with the transportation of passengers or property by railroad" also may be an employer. *See* I.R.C. § 3231(a). Treasury regulation § 31.3231(a)-1(b) advises that "control" may arise from "agreements, licenses, or any other devices [that] insure that the operation of the company is in the interest of one or more carriers." Via contracting, among other things, a carrier may create obligations that survive its railroad operations. Its control thereby may outlive it temporarily: to the extent possible, its successor, a bankruptcy Trustee, or some other individual or entity must fulfill many of its obligations. The promise of such fulfillment serves an operating carrier's interests. In this case, the contingent promise of wage repayment allowed the Railroad to lower operating costs. At least until its former employees received repayment of the wage reduction, the Railroad's control endured.

Whether an employer paid the remuneration leaves unresolved whether it was compensation, which "means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers," I.R.C. § 3231(e)(1) (Supp. II 1984). Chicago Milwaukee argues that the repayment of the wage reduction did not constitute

compensation under the Tax Act. It contends, more specifically:

> While the individuals were performing services for [the Railroad], they received contemporaneous compensation for their services (albeit at a reduced wage) with no clear entitlement to any additional payments. Whether additional payments ever would be made, how much they would be, and when they might be received depended on a number of conditions eventually that were beyond the employees' control and unrelated to the services that they provided. . . . Those conditions were satisfied, but the fact that they were satisfied years after the fact does not transform the contingent payments into a "direct exchange" of money for services that qualifies as "compensation" under the [Tax Act].

But whether remuneration is compensation does not depend upon the absence of conditions beyond employees' control. Otherwise, compensation would hardly exist. The solvency of any business, which affects its ability to pay employees, always depends upon exogenous and unpredictable events and actors. Furthermore, the amount of repayment of the wage reduction that any individual received depended not only upon the adjusted sale price of the Railroad's assets, it also depended upon the services each performed, whether determined by hours worked or otherwise. The repayment of the reduction was compensation.

Conclusion

Accordingly, we affirm the judgment of the Court of Federal Claims.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 92-462T

(Filed: April 23, 1996)

CHICAGO MILWAUKEE CORPORATION,	) Tax refund suit, Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3201 *et seq.*;
Plaintiff,	) "Compensation," 26 U.S.C. § 3231(e); "Employer,"
v.	) 26 U.S.C. § 3231(a) & (g);
THE UNITED STATES,	) "Employee," 26 U.S.C. § 3231(b); Employment relationship evaluated at the time
Defendant.	) the services were rendered.

Joel J. Africk, Chicago, Illinois, attorney of record for plaintiff.

George L. Squires, Washington, D.C., with whom was *Assistant Attorney General Loretta C. Argrett*, for defendant.

OPINION

REGINALD W. GIBSON, *Senior Judge*:

INTRODUCTION

This tax refund suit, following a trial on the merits, presents the issue of—whether plaintiff, Chicago Milwaukee Corporation, was liable for certain employment taxes previously paid pursuant to the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§ 3201-33 (1994). These taxes were paid shortly after plaintiff (and its predecessor in reorganization) made lump-sum payments to former railroad employees who had previously entered into an agreement with the trustee to continue working for reduced wages during the reorganization period. The RRTA at issue imposes an employment tax similar to, *and in lieu of*, the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§ 3101-28 (1994), on the compensation paid to *railroad* employees by their employers. Similar to the FICA, the tax under the RRTA is imposed, in part, on the employee and, in part, on the employer, with the latter responsible for withholding the employee's share and also required to pay over both portions to the IRS. Plaintiff has brought suit, at bar, seeking a full refund *of both* the employees' and employer's portions of RRTA taxes it alleges were erroneously paid to the government.

After a careful consideration of the evidence and the arguments of counsel, this court is constrained to conclude that the two payments at issue are properly subject to the RRTA because *both* payments were, *inter alia*, "compensation," when earned and received, for services rendered by the recipients, inasmuch as the bankruptcy trustee and the subsidiary company were railroad "employers" *at the time said services were*

rendered, and because the payees were in fact railroad "employees" at the time the services were rendered, all as defined in the RRTA and accompanying regulations. Accordingly, plaintiff has failed to meet its burden of proving an entitlement to a tax refund. Therefore, for the reasons detailed hereinafter, judgment must be entered for defendant, and the complaint (as amended) dismissed.

FACTS

In this case, the facts are *not* in dispute. The parties have filed comprehensive joint stipulations of fact, which the court hereby incorporates by reference, and said facts are found accordingly. In addition, a trial was held in Washington, D.C., on March 18, 1996. At that time, the parties introduced various documentary exhibits (including the joint stipulations, JX2) into the record, but chose to call *no* witnesses. The following operative facts, provided for the reader's convenience, are found from the stipulations as well as the exhibits.

The Chicago, Milwaukee, St. Paul and Pacific Railroad ("Milwaukee R.R.") was a class one (1) transcontinental railroad that provided transportation, subject to the jurisdiction of the Interstate Commerce Commission (ICC) (*see* 49 U.S.C. § 10501 (1988)) over nearly 10,000 miles of track in the mid- and northwestern United States. Plaintiff, Chicago Milwaukee Corporation (CMC), a holding company, owned virtually all of the stock (96% of the common and 92% of the preferred, as of 1980) in Milwaukee R.R. On December 19, 1977, Milwaukee R.R., facing insolvency, filed a petition in the U.S. District Court for the Northern District of Illinois, Eastern Division ("the reorganization court") to effect a plan of reorganization

under the Bankruptcy Act of 1898. *See* 11 U.S.C. § 205 (1976) (repealed 1978). Thereafter, in early 1978, Stanley Hillman, and later that year Richard Ogilvie, were appointed by the reorganization court as Trustee ("the Trustee") for Milwaukee R.R.

By March 1980, Milwaukee R.R., under the control of the Trustee, had ceased operations over most of its lines. The Trustee, over time, had abandoned rail lines which were being sold, along with timber property, to generate cash for the reorganization. However, by September 1981, the Trustee came to the conclusion that wage concessions from Milwaukee R.R.'s employees would be necessary if the railroad was to continue operations during the period of reorganization. In addition, in response to the Trustee's November 1981 request to borrow $60 million to finance continued railroad operations, the reorganization court directed that the money could not be borrowed *unless* the Trustee obtained necessary wage concessions. Therefore, with the reorganization court's permission, the Trustee began wage reduction negotiations with the rail labor unions.

Following thereon, in early 1982, rail labor (*i.e.*, 16 unions), as well as management employees, and the Trustee entered into a Wage Reduction Agreement ("WRA"), which the reorganization court approved on January 19, 1982.

In part, the WRA provided, *inter alia*, as follows:

> (a) for a *7% reduction in taxable wages of all* [Milwaukee R.R.] *employees* beginning January 1, 1982 and ending on the earliest of (i) merger, sale, or

> reorganization of currently operated rail lines; (ii) cessation of operations and commencement of liquidation; or (iii) January 1, 1985. (WRA ¶ 1, 3-7.)
>
> (b) for a contingent incentive bonus payable to [the] employees in the event that [Milwaukee R.R.] is reorganized for each of the first five years after the year such reorganization is consummated. (WRA ¶ 8.)
>
> (c) for *the return to employees* who had wages reduced under the WRA *of up to the amount by which wages were reduced* in the event all or substantially all [Milwaukee R.R.] . . . lines currently operated are sold or merged for a consideration that exceeds the ICC book value. The precise amount to be repaid would vary with the purchase price as the purchase price increased above the ICC book value up to the amount by which wages were reduced.

JX2 at 7-8, Joint Stipulation (Jt. Stip.) ¶ 19 (emphasis added). Between the stipulated period, January 1, 1982 and December 31, 1984, the employees had their wages reduced by an aggregate total of approximately $35 million.

At the time of the WRA, there were no prospective purchasers for Milwaukee R.R.'s railroad lines. However, by 1984, there were three bidders for the rail operations of Milwaukee R.R. These bidders were Grand Trunk Corporation, Chicago and Northwestern Transportation Company, and the Soo Line Railroad Company ("Soo Line"). Eventually, after an ICC vote in favor of the Soo Line proposal, the reorganization court approved Soo Line's offer to purchase the railroad lines

of plaintiff. Shortly thereafter, on April 6, 1984, the Trustee and the Soo Line, and Soo Line's affiliate, SLRCO, Inc., entered into an Asset Purchase Agreement ("APA"), according to which the Trustee agreed to sell to Soo Line all of Milwaukee R.R.'s "Rail Assets" in exchange for $148 million (subject to adjustments) plus the assumption by Soo Line of Milwaukee R.R.'s "rail liabilities."

Under the terms of the APA, Rail Assets included "all interests of the Trustee in real property and fixtures . . . essential to the provision of rail services," as well as "all machinery, equipment, vehicles and items of tangible personal property owned by the Trustee and used or held for use in the conduct of the Railroad (other than leased property)." JX2 at 9-10, Jt. Stip. ¶ 24(a). "Rail Assets" *did not* include, however, several identified rail lines. Furthermore, despite the assumption of plaintiff's rail liabilities by Soo Line, pursuant to the APA, the Trustee remained responsible for his obligations under the WRA. The ICC found, on September 12, 1984, that the APA should be approved, and, on February 19, 1985, the reorganization court approved the sale of Milwaukee R.R.'s "Rail Assets" stating that, upon consummation of the APA, all common carrier obligations of the Trustee and Milwaukee R.R. would be assumed by Soo Line and SLRCO.

While the APA excepted *five* (5) railroad lines from the sale of assets, *after* February 19, 1985, neither the Trustee, Milwaukee R.R., its successors, nor their employees engaged in any activities related to the transportation of passengers or property by railroad. Rather, with respect to these five railroad lines, Milwaukee R.R. and its successors retained ownership of

the underlying real property over which others (predominantly Soo Line pursuant to lease arrangements) operated railroads. As of February 19, 1985, the land over which the five excepted lines operated constituted about 2% of Milwaukee R.R.'s total real estate holdings. On April 2, 1985, the ICC ruled that the Milwaukee R.R. was "no longer operating as a common carrier" and that, therefore, Milwaukee R.R. was no longer subject to the ICC's general jurisdiction. Jt. Stip. ¶ 33.

Because of a disagreement between the Trustee and Soo Line over the exact purchase price under the APA, the Trustee was unable to fix the amount to which the employees were entitled pursuant to the WRA. Eventually, as a result of a letter from a Soo Line official, the Trustee was able to determine that the employees who had had their wages reduced *during 1982-1984* would at least be entitled to 66% of the amount by which their wages were reduced upon the definitization of the purchase price. Accordingly, on October 16, 1985, the Trustee distributed payments equaling 66% of the wage reductions to the former employees.

Subsequently, in November 1985, pursuant to an order of the reorganization court, the Trustee transferred all rights and interest in the estate back to Milwaukee R.R., which was renamed CMC Real Estate Corporation ("CMC Real Estate"). Finally, in July 1986, CMC Real Estate and Soo Line resolved the disagreement over the cash purchase price of Milwaukee R.R.'s Rail Assets. The final negotiated purchase price, approved by the reorganization court on September 12, 1986, was sufficient to entitle the former employees of Milwaukee R.R. to the full remaining 34% of their reduced wages. Thus,

on or about September 22, 1986, CMC Real Estate made a second payment to the former Milwaukee R.R. employees for the remaining 34%.

In connection with each of these payments, compensating the former employees by the repayment for their reduced wages during the WRA, both the Trustee and CMC Real Estate withheld from the employees' payment checks the applicable payroll taxes under the RRTA. In addition, in both cases, the Trustee and CMC Real Estate, respectively, also paid the employer portion of the RRTA tax. With respect to the October 1985 payment, the Trustee paid the employee and employer portions of the tax to the IRS on October 18, 1985, and filed its RRTA tax return for 1985 with the IRS on April 17, 1986. Respecting the second payment in September 1986, CMC Real Estate paid both portions of the RRTA tax to the IRS on October 3, 1986. On January 28, 1987, CMC Real Estate filed its RRTA tax return for 1986 with the IRS. CMC Real Estate also filed FICA returns for 1985 and 1986.

By the time of the first payment in October 1985, *virtually all* of the former Milwaukee R.R. employees who had been subject to the WRA had terminated their employment with Milwaukee R.R. (and its successors) and were in the employ of Soo Line. Only nine (9) individuals who had been subject to the WRA remained in the employ of Milwaukee R.R. and, later, CMC Real Estate. None of these nine employees were engaged in railroad operations. Rather, each of these individuals was engaged in real state activities unrelated to railroad operations.

On or about April 22, 1988, CMC Real Estate filed timely administrative claims with the IRS for refunds of the

employment taxes paid by it and the Trustee in connection with the October 1985 and September 1986 payments to the former employees pursuant to the WRA.[1/] For four years the IRS took no action on these claims. In the interim, CMC Real Estate was liquidated into its parent corporation, CMC. On July 9, 1992, CMC filed suit in this court seeking a refund of RRTA taxes. An amended complaint was subsequently filed on October 8, 1992. The government has counterclaimed, seeking to offset any recovery by plaintiff with FICA taxes that should have been paid on the two payments if RRTA taxes were not owed.

PROCEDURAL HISTORY

Thereafter, on October 30, 1992, defendant filed a motion to dismiss the foregoing amended complaint for lack of subject matter jurisdiction or, alternatively, for failure to state a claim. In our earlier dispositive decision, *Chicago Milwaukee Corp. v. United States*, 29 Fed. Cl. 77 (1993), we held that this court lacked jurisdiction to entertain any part of plaintiff's claim for a refund of allegedly overpaid RRTA taxes. Accordingly, we dismissed the amended complaint.

The issue then before the court was—whether Treas. Reg. § 31.6402(a)-2(a)(2)(i) imposes a mandatory jurisdictional

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[1/] These administrative claims failed to include a statement that CMC Real Estate had either repaid the employees' share of the tax to the employees or had secured their consent to pursue the refund. *See* Treas. Reg. § 31.6402(a)-2(a)(2)(i) (1995).

requirement, under I.R.C. § 7422(a),[2] on taxpayer's claim for a refund of both the employee portion as well as the employer portion of the tax. The relevant regulation states, in pertinent part, that:

> *Every claim filed* by an employer for refund or credit of employee tax under [the RRTA] . . ., collected from an employee, *shall include* a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund or credit.

Treas. Reg. § 31.6402(a)-2(a)(2)(i) (1995) (emphasis added). Based on the plain and obviously unambiguous language of the regulation, we held that such "compliance *antecedent to* the filing of a claim for refund of the employees' share of the tax *is mandatory*." 29 Fed. Cl. at 781 (emphasis added). This we held because the regulation literally and explicitly provides when the "statement" *shall* be included, *i.e.*, "[when e]very claim [is] filed by an employer."

After holding that it was patently clear that this regulation was a mandatory condition precedent jurisdictional requirement on the maintenance of an action for the *employees'* share of

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[2] Section 7422 states in relevant part:

> *No suit or proceeding shall be maintained* in any court for the recovery of any internal revenue tax . . . *until a claim for refund or credit has been duly filed* with the Secretary *according to* the provisions of law in that regard, and *the regulations* of the Secretary established in pursuance thereof.

I.R.C. § 7422 (emphasis added).

RRTA taxes, the court went on to consider the further question of—whether an administrative claim for the employees' portion of the tax, in compliance with the above regulation, was *also* a mandatory jurisdictional *prerequisite to* the maintenance of an action for a refund of the *employer's* portion of the tax. Based on a review of the relevant regulations and the case law, we held that Treas. Reg. § 31.6402(a)-2(a)(2)(i) was clearly a jurisdictional precondition to the institution of a suit for the refund of the employer's portion of the RRTA tax as well as the employees' portion thereof.

On appeal, however, the United States Court of Appeals for the Federal Circuit disagreed and reversed. There, the court narrowly framed the issue for decision as follows: "whether Treas. Reg. § 31.6402(a)-2(a)(2) (1994) imposes a jurisdictional requirement under I.R.C. § 7422(a)." *Chicago Milwaukee Corp. v. United States*, 40 F.2d 373, 375 (Fed. Cir. 1994). The court then began its analysis by noting that the regulation at issue (*i.e.*, § 31.6402(a)-2(a)(2)), notwithstanding the unambiguous initial sentence, did "not specify when the employer must provide the certification. On its face, [that] regulation neither requires nor prohibits including the certification at the time of filing." *Id.* Next, the court turned to discuss I.R.C. § 7422(a), noting that the Court of Claims had construed this section as a notice provision designed to prevent surprise and give notice to the IRS. *See Burlington Northern, Inc. v. United States*, 684 F.2d 866, 868-69 (Ct. Cl. 1982). Thus, the court held that as long as the government is given notice of the taxpayer's claim, an administrative claim is jurisdictionally adequate under § 7422(a). Accordingly, the

court concluded that treating the regulatory certification requirement as jurisdictional would not advance the policies expressed in § 7422(a). *Chicago Milwaukee*, 40 F.3d at 375.

In support of this position, the Court of Appeals relied on *IBM v. United States*, 343 F.2d 914 (Ct. Cl. 1965). In *IBM*, the taxpayer, a computer manufacturer, sued for the refund of certain excise taxes levied on computer sales contending that the specific computers at issue in the case were not covered by the tax. I.R.C. § 6416(a)(1)(C) provided that "no credit or refund of any overpayment" could be allowed unless the claimant established that it had repaid the tax to its vendees or had secured their written consent to maintain the claim. Because § 6416(a)(1) limited the actual refund, but did not condition the right to bring a claim, the *IBM* court held that the necessary written consents could be produced at any time prior to the ultimate award. *Id.* at 917-18. Finally, the *IBM* court noted that there were good reasons not to superimpose a requirement that the certification be made *prior* to filing as such a requirement would place a heavy burden on the claimant at a time when the refund was still only hypothetical. *Id.* at 918.

The Federal Circuit noted that the requirements under the statute at issue in *IBM* were similar, although not identical, to those in the regulations at issue before it. Like the *IBM* court, the Court of Appeals believed that there was no justification for imposing the certification burden on CMC at the time of the filing of an administrative claim. The court held that the "basic thrust of the court's view in *IBM* controls here as well." *Chicago Milwaukee*, 40 F.3d at 376.

Lastly, the Federal Circuit relied on the views of the IRS on the certification requirement in support of its holding. The court cited, in this connection, an IRS General Counsel Memorandum ("GCM"), IRS GCM 38,786, in which the General Counsel stated that the certification requirement need not be met at the time of the filing of an administrative claim, so long as the claimant familiarized the IRS with the essence of his claim. *Id.* The appeals court noted that GCM "function[s] as a body of 'working law' *within the IRS*." *Id.* (emphasis added) (quoting *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 683 (D.C. Cir. 1981)).

For these reasons, the Federal Circuit held that Treas. Reg. § 31.6402(a)-2(a)(2) was not jurisdictional. Therefore, the Court of Appeals, *Id.* at 376-77, instructed that:

> CMC may demonstrate compliance with [the certification requirement] after the Court of Federal Claims determines whether CMC is a railroad "employer." CMC may proceed with its suit for a refund of the employer and employee portions of RRTA taxes. Accordingly, this court does not reach whether an employer may claim a refund of the employer portion alone.

On remand, following the Federal Circuit's direction, this court dutifully allowed this matter to proceed to trial on the merits. As previously noted, a trial was held on March 18, 1996. The issues having been fully briefed by the parties, we now turn to address the substantive merits of the instant case.

CONTENTIONS OF THE PARTIES

I. *Plaintiff*

CMC makes three points in support of its position that it is entitled to a refund of the RRTA taxes previously paid. First, CMC contends that, *at the time of the payments*, neither the Trustee nor CMC Real Estate were railroad "employer[s]"[1/] under the RRTA. Because Milwaukee R.R. sold all of its operating Rail Assets in February 1985 and was declared by the ICC in April 1985 to no longer be a common carrier railroad, plaintiff warmly maintains that both the Trustee and CMC Real Estate were not "employers" *at the time of the payments* in October 1985 and September 1986.

Second, CMC alleges that, *at the time of the 1985 and 1986 payments*, 99.9% of the recipients thereof were no longer employees of Milwaukee R.R., the Trustee, or CMC Real Estate. Against this background, plaintiff argues that the RRTA tax only applies to individuals in the service of the employer *at the time of the payment*. Moreover, it contends that this statutory scheme is in contradistinction to the federal income tax withholding statute where Congress expressly extended applicability to former employees, by using the past and present

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[1/] I.R.C. § 3231(a) defines an "employer" as, *inter alia*, ". . . any carrier (as defined in subsection (g)) and any company . . . directly or indirectly owned or controlled by one or more such carriers . . . which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property by railroad, or the receipt . . . or handling of property transported by railroad, and any . . . trustee . . . when in the possession of the property or operating all or any part of the business of any such employer."

tense in defining an "employer." I.R.C. § 3401(d). Therefore, avers CMC, since 99.9% of the payment recipients were not then employees, the RRTA taxes at issue were not legally due.

Third, plaintiff contends that the 1985 and 1986 payments were not "compensation" as defined by the RRTA and that, therefore, those payments were not subject to the tax. The RRTA, I.R.C. § 3231(e)(1), defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to [an] employer." Furthermore, CMC maintains that the payment must be in "direct exchange" for services performed, citing *Humble Oil & Refining Co. v. United States*, 442 F.2d 1362, 1368 (Ct. Cl. 1971). Because the payment recipients had no clear and unconditional entitlement to receive any additional payment when the services were performed (*i.e.*, payment was contingent on the sale of the Rail Assets at a sufficiently high price), plaintiff argues that the payments were not in direct exchange for services rendered and, thus, not compensation. In addition to the foregoing, CMC notes that these very same payments were ruled by the Eighth Circuit to not be compensation for the purposes of certain former employees' pension plan. *Bennett v. Soo Line R.R.*, 35 F.3d 334 (8th Cir. 1994).

Finally, CMC contends that the government is not entitled to an offset for FICA taxes allegedly owed on the 1985 and 1986 payments. First, according to plaintiff, the contingent nature of the payments means that they were not "wages" subject to the FICA tax. Second, CMC alleges that defendant's claim is barred by the statute of limitations. I.R.C. § 6501(a). And, lastly, CMC maintains that the government cannot prove

that any further withholding is allowable for the employees' share of the FICA tax for the years in question as it must to meet its burden on the offset.

II. *Defendant*

In response, defendant strenuously argues that the 1985 and 1986 payments were unquestionably "compensation" paid by an "employer" to employees and, thus, were clearly subject to the RRTA tax. The government observes that the payments were made to the railroad's former employees who had operated the railroad from 1982 to 1985, during the Wage Reduction Agreement. Moreover, defendant notes that the Trustee had operated Milwaukee R.R. from 1977 to 1985 and that CMC Real Estate was the same entity as the railroad with its name changed. The government further contends that statutory interpretation should not turn solely on the verb tense used by Congress. Under plaintiff's hospitable view, suggests defendant, no taxes would be due on previously-earned wages paid *after* an employee left the railroad's employ, for instance, because of insufficient funds at the earlier time. In addition, avers the government, the reorganization plan treated the payments at issue as Class A wage claims for labor, deemed to have been paid by Milwaukee R.R. Finally, the government contends that, as a general rule, deferred wage payments are subject to employment taxes, citing *Otte v. United States*, 419 U.S. 43 (1974).

Second, defendant maintains that, if the 1985 and 1986 payments were not covered by the RRTA, then FICA taxes are due on those payments. Furthermore, defendant argues that the statute of limitations does not bar its claim for an offset. Under

I.R.C. § 3503,[4] avers the government, it is entitled to offset the amount of FICA taxes owed from any refund of RRTA taxes. Additionally, the government contends that the doctrine of equitable recoupment allows it to offset any FICA taxes owed since such liability arose from the same transaction for which plaintiff seeks a refund. To allow plaintiff a windfall refund of RRTA taxes would be clearly inequitable, according to the government.

DISCUSSION

I. *CMC's Entitlement to a Tax Refund*

The RRTA imposes a tax on railroad employers and employees equal to a percentage of the compensation paid by the employer and received by the employee for services rendered by the employee to the employer. *See* I.R.C. §§ 3201(a) & (b), 3221 (a) & (b). As a consequence, three issues are before the court:

(1) Were the disputed payments "compensation" under the RRTA?

(2) Were the payments made by an RRTA "employer?" and

(3) Were the payees "employees" pursuant to the RRTA?

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[4] Section 3503 provides that—"Any tax paid under chapter 21 or 22 by a taxpayer with respect to any period with respect to which he is not liable to tax under such chapter shall be credited against the tax, if any, imposed by such other chapter upon the taxpayer, and the balance, if any, shall be refunded."

Issues (2) and (3) depend on a further, preliminary legal issue, *i.e.*, under the RRTA, what is the correct point in time at which to evaluate the employment relationship to determine whether the payor and the payees were an "employer" and "employees," respectively?

Because we need not reach issues (2) and (3) (as well as the fundamental legal issue embedded therein) unless the payments were "compensation," issue (1) is a threshold inquiry and the appropriate starting point of our analysis. If, and only if, the payments were "compensation," pursuant to the RRTA, will the court need to ascertain whether or not the payor and the payees wee an "employer" and "employees," respectively.

A. *Were the Two Payments to the Railroad's Former Employees "Compensation" Under the RRTA?*

I.R.C. § 3231(e)(1) defines "compensation" as "money remuneration paid to an individual for services rendered as an employee to one or more employers." *Accord* Treas. Reg. § 31.3231(e)-1(a)(1) (1986).[2/] For the time being we assume that the payors and the payees were employers and employees, since we will need to address that issue later. Thus, the question becomes—Were the payments "money remuneration . . . for services rendered?"

At bar, the two payments were made, pursuant to the Wage Reduction Agreement (WRA), to individuals who had agreed to work (*i.e.*, render service) and did so work as employees at

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[2/] Unless otherwise noted, all "Treas. Reg." citations in the "Discussion" section are to the 1986 regulations, which were also in effect in 1985.

a previously reduced wage rate, in compensation for that reduction in wages. Clearly then, these payments were remuneration for such services rendered. And only those employees who *had rendered* service during the period covered by the WRA (1982-84) were entitled to payment, and, in fact, those employees were entitled to receive *up to the precise amount by which their wages had been previously reduced.*

Consistent with the foregoing is the fact that the regulations expressly provide that "[a]mounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position" are to be included as compensation. Treas. Reg. 31.3231(e)-1(b)(3).[9] Thus, when the Milwaukee employees entered into the

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[9] Plaintiff argues that, as a result of the 1975 and 1983 amendments to the RRTA, *see* Pub. L. No. 94-93, § 204, 89 Stat. 461, 466 (1975); Pub. L. No. 98-76, 97 Stat. 411, 424-426 (1983), which, *inter alia*, eliminated a phrase providing that compensation included payments for "time lost" from the statutory definition, this regulation was no longer supported by the statute. However, the legislative history of these amendments, *see Atchison, Topeka, & Santa Fe Ry. v. United States*, 628 F. Supp. 1431 (D. Kan. 1986) (delineating the legislative history of the 1975 amendment), reveals that the 1975 amendment was intended solely to clarify that the RRTA tax was assessed to the extent and at the rate applicable *when paid*, rather than when earned, as had been the case prior to 1975, *see* Rev. Rul. 75-266, 1975-2 Cum. Bul. 408, and that the 1983 amendment to the definition of compensation was a further "technical and conforming amendment" designed to accommodate the 1975 change in the law from an "earned basis" to a "paid basis." H. Report 98-30 (1983), 1983 U.S.C.C.A.N. 729, 823. Nothing in the legislative history indicates that Congress intended to change the substantive definition of "compensation." Rather, Congress sought to make compensation taxable to the extent and at the rate applicable when paid. Therefore, Congress deleted certain provisions providing that compensation for time lost is to be deemed earned in the month when the

WRA, it is clear beyond cavil that they were displaced to "a less remunerative position" (exactly 7% less remunerative).[2/] In addition, the amounts paid by the Trustee and CMC Real Estate were paid pursuant to the WRA to make up for the "loss of earnings during an identifiable period," *i.e.*, while the WRA was in effect (1982-84). Consequently, not only do the payments at issue unambiguously satisfy the statutory definition of "compensation," but the regulations also make clear that these payments were, as a matter of law, "compensation."

Moreover, a temporary regulation, published in the Federal Register on January 7, 1985, 50 Fed. Reg. 577 (1985), and published in the Code of Federal Regulations, 26 C.F.R. (Temp. Treas. Reg.) § 31.3231(e)-2T (1986), is also instructive:

> "[C]ompensation" include[s] *any benefit* provided to or on behalf of an employee . . . if the employment agreement provides, either expressly or impliedly, for the inclusion of the benefit as part of the employee's remuneration . . . [unless] it is reasonable to assume

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time is lost, as when the compensation was earned was no longer relevant to determining the extent or rate at which compensation was taxable. Indeed, in late 1994, the Treasury Department specifically rejected the notion that the amendments to the definition of "compensation" made compensation for time lost non-taxable in T.D. 8582, 1995-1 Cum. Bul. 197, 188.

2/ Plaintiff contends that the employees were not "displaced" to another "position" because they continued in the same occupation performing the same duties as had been performed prior to the WRA. Plaintiff cites no authority for the proposition that the term "position" should be read so narrowly. As the court sees it, based on the regulation's plain language, a wage reduction *is* a displacement to a less remunerative position.

> that the employee will be able to exclude such benefit from income under section 117 or 132.

(emphasis added). This regulation demonstrates that the term "compensation" is relatively broad. Moreover, it is directly applicable to the facts at bar in that the WRA, undoubtedly part of the employment agreement, expressly provided that the employees would receive the benefit of the lump-sum payments, if conditions permitted, as part of a total package of remuneration. *Cf. Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 28-29 (1978) (FICA "wages" include the "total package of remuneration designed to attract and hold the employee"). Since the payments at issue were not excludable from income, application of this regulation, published at the time of both the 1985 and 1986 payments, inescapably leads to the conclusion that the payments were "compensation" under I.R.C. § 3231(e).

Plaintiff argues that the contingent character of the payments precludes them from meeting the definition of "compensation." However, nothing in the statutory definition or the regulations supports this argument. Simply put, the contingent nature of the payment does not and cannot change the incontrovertible fact that they were paid in exchange for *services rendered* during the WRA period, and they were certainly "money remuneration." Plaintiff, in relying on *Humble Oil & Refining Co.*, 442 F.2d at 1368, states that, to be considered compensation, the payments must have been in "direct exchange" for services rendered. Plaintiff further avers that, because of the contingent character of the payments at

issue, they were, therefore, not in "direct exchange" for services rendered.

First, *Humble* involved income tax withholding rather than the RRTA withholding. Moreover, even assuming the identity between FICA "wages" in I.R.C. § 3402 and "compensation" under the RRTA, the payments that the Court of Claims held not to constitute wages were reimbursements (or advances) for meals and lodging consumed while moving to a new place of employment for the benefit of the employer. That circumstance is a significant fact distinction from the clear and unambiguous facts at bar. In that case, the court found that "[n]o service was performed by plaintiff's employees in order to obtain these reimbursements. . . ." *Id.* at 1365. At bar, the payments were clearly in "direct exchange" *for services rendered.* They served no other purpose of the employer. *Cf. Stubbs, Overbeck & Assocs. v. United States*, 445 F.2d 1143, 1150 (5th Cir. 1971) ("where the withholding statute is involved, the matter should be viewed from the standpoint of the employer's purpose in making the payment"), *cited in General Elevator Corp. v. United States*, 20 Cl. Ct. 345, 351-52 (1990). The payments at bar were intended to induce the employees to perform services (at a reduced wage rate), and, as stated above, only those who actually performed services were entitled to obtain the payments.

Finally, plaintiff relies on the Eighth Circuit's ruling in *Bennett v. Soo Line R.R. Co.*, 35 F.3d 334 (8th Cir. 1994). In that case, the court upheld the trial court's determination that the very same payments at issue in this case were not "Milwaukee compensation" for the purposes of pension-related terms in the

Asset Purchase Agreement (APA). *See* JX2 at 68-69, Jt. Stip. Ex. B, ¶ 28(a) & (b); JX10 at 34-35. Obviously, another court's construction of a clause in a private contract is not obligatory on this court's interpretation of a statute. Moreover, the Court of Appeals specifically referred to the payments as "retroactive *wage* payments." 35 F.3d at 336 (emphasis added). Thus, even the *Bennett* court recognized, at least implicitly, that these payments were compensation for services rendered by the employees during the WRA. Rather, the court's decision turned on the meaning of the term "Milwaukee" modifying "compensation." The court held that the APA incorporated the definition of "compensation" in the Milwaukee R.R. pension plan, which the court further held was limited by the word "Milwaukee" to the years 1982-1984. *Id.* at 337. I.R.C. § 3231(e) contains no such limitation.

Because the 1985 and 1986 payments were made pursuant to the WRA, the sole purpose of which was to induce the employees to continue rendering service to the railroad, it inescapably follows that the payments were "money remuneration . . . for services rendered." Thus, we hold that the payments were taxable under the RRTA as "compensation" if paid by an "employer" to "employees," which leads to the next issue the court must address.

B. *At What Point In Time Must The Court Evaluate The Employer/Employee Relationship?*

I.R.C. § 3201(a) & (b) (employee share) imposes on the employee an employment tax equal to a "percentage of the compensation received during any calendar year by such employee for services rendered by such employee," and I.R.C.

§ 3221(a) & (b) (employer share) similarly imposes a payroll tax on the employer equal to a "percentage of compensation paid during any calendar year by such employer for services rendered to such employer." Thus, at first blush, there are two possible readings of the statute on the question of when one should evaluate employer/employee status to determine the applicability of the RRTA: (a) when the compensation was paid (CMC's contention); and (b) when the services for which the payee is being compensated were rendered.

Plaintiff focuses narrowly on the exclusive use of the present tense in the statutory definitions of an employee "in the service" of a railroad employer. *See* I.R.C. § 3231(b) & (d). CMC argues that the exclusive use of the present tense in selected provisions of the RRTA indicates that Congress intended that employment status under the act should be determined *at the time of payment*. In support of this contention, plaintiff cites to *Otte*, wherein the Supreme Court held that the use of both the present and past tenses of "perform" in defining an "employer" "plainly reveals that a continuing employment relationship is not a prerequisite for a payment's qualification as 'wages' [under federal income tax withholding and FICA]." 419 U.S. at 49-50.[8/]

[8/] The Court, in *Otte*, most certainly did not say that the use of both past and present verb tenses was the only way that Congress might express its intent that taxes would be owed for wages paid after the employment relationship had ended. Therefore, we do not view it as significant that Congress did not choose this manner of expressing its intent in the RRTA, especially since the RRTA predates both the withholding provisions of the Internal Revenue Code and, of course, the *Otte* decision.

However, the fact that the RRTA uses the present tense in certain definitional provisions does not really answer (but rather it begs) the dispositive question. As the court views the operative facts, most, if not all, of the relevant events are in the past. Surely plaintiff does not contend that the court should look at the issue of the existence of an employer/employee relationship on the day it issues its decision in this case to determine the applicability of the tax law. Clearly, then, the court is required to pick some point in time in the past at which to make such an evaluation.

Our analysis convinces us that the statutory language of the RRTA supports reading (b) above, to wit, that the employer/employee status for imposing the tax should be determined *when the services are rendered.* First, the tax is imposed on "compensation," which is defined as "money remuneration paid to an *individual* for services rendered as an *employee* to one or more *employers*." I.R.C. § 3231(e) (emphasis added). The juxtaposition of the term "individual" when discussing payment and the terms "employee" and "employer" in relation to the rendering of services makes it clear beyond cavil that Congress intended that the time at which the services were rendered would be the one at which the determination of employer/employee status should occur. This distinction is also explicated in the applicable regulations, which define compensation as "all remuneration . . . which is earned by an *individual* for services rendered as an *employee* to an *employer*." Treas. Reg. § 31.3231(e)-1(a)(1) (emphasis added).

Second, as noted above, the amount of the tax (both the employees' and employer's portions) is equal to a specified

percentage of "compensation received [or paid in the case of the employer] . . . for services rendered by such employee [or to such employer]." I.R.C. §§ 3201 & 3221. Again, the statutory language significantly emphasizes the employment relationship in connection with the rendering of service by an employee to his employer. Moreover, the regulations issued under I.R.C. § 3201 (employee tax) state that "the employee tax . . . is measured by the amount of compensation paid to an *individual for services rendered as an employee to [an] employer[].*" Treas. Reg. § 31.3201-1 (emphasis added). This provision removes any doubt in the statutory language that the existence of the employment relationship must be evaluated and determined as of the time the services are rendered and the compensation earned. Thus, the foregoing statutory and regulatory language plainly and amply demonstrates a congressional intent that *the time when the services*, for which the compensation is paid, *were rendered* is the correct time to ascertain whether or not the payor and payee are in an employer and employee relationship, respectively, within the purview of the RRTA.

Under plaintiff's hospitable reading of the statute, an employee who quits his job on Wednesday (further obviating the employee/employer relationship) and thereafter picks up his final paycheck on Monday would not be subject to the tax even though he was undoubtedly a railroad employee when he *earned* his pay. It strains credulity to think that Congress could have intended such an absurd result,[2/] and the relevant regulations

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2/ Under plaintiff's proposed interpretation, taxpayers might be induced to engage in a variety of schemes to avoid RRTA taxation. For example,

support the view that Congress did not. Treas. Reg. § 31.3231(e)-1(a)(1) provides that "payroll" payments to an individual are presumed to be "compensation for services rendered by such individual as an employee of the employer."[10/] Thus, under this regulation, a final paycheck, after the termination of an employment relationship, is presumed to be "compensation" for services rendered by the employee and, thus, subject to the RRTA.

Indeed, the legislative history of the statute shows that Congress did not intend plaintiff's avowed reading. Originally enacted as the "Carriers Taxing Act of 1937," Pub. L. No. 75-174, 50 Stat. 435, the RRTA repealed and replaced an earlier and similar tax act. In the report of the House Ways and Means Committee recommending passage of the bill, it was noted that the 1937 Act changed the definition of "compensation" (versus the earlier provision) to "make it clear that what is significant is that the compensation has been *earned* by the employee, not that it has been actually received by him." H. Report No. 75-1071 (1937) (emphasis added) (incorporated into S. Report No.

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a railroad facing insolvency might choose to delay wage payments until after it ceased operations in order to avoid RRTA taxes. On plaintiff's absurd and overly strict hypothesis, a taxpayer could even fire its employees every Friday at 5 p.m., issue paychecks at 5:15, then rehire its employees the following Monday morning, and claim that it was not subject to the RRTA since, at the time of payment, no employment relationship existed between the payor and the payees.

[10/] In T.D. 8582, 1995-1 Cum. Bul. 187, 188, the Treasury Department specifically rejected the view that Congress intended by the 1983 amendment, which deleted similar language from the RRTA, to remove this presumption. *See* note 6, *supra*.

75-818 (1937)). If Congress thought that the *fact* of earning the compensation by an employee from an employer was significant, it follows *a fortiori* that it believed that the time at which said compensation was *earned*, as a fact, was also significant. It further follows, therefore, that Congress intended that the correct time to determine whether the payor and payee were an "employer" and "employee," respectively, under the act is the time at which the compensation is earned.

Moreover, prior to the RRTA's amendment in 1975, as reflected in Rev. Rul. 75-266, 1975-2 Cum. Bul. 408, compensation was subject to RRTA taxes *to the extent and at the rate applicable* when it was earned. *Atchison*, 628 F. Supp. at 1433. Under this regime, the entire focus of the statute was on when the compensation was earned (*i.e.*, when the services were rendered). In 1975, in response to Rev. Rul. 75-266, Congress amended the RRTA so that RRTA taxes would be on an "as paid" basis, rather than an "as earned" basis, meaning *only* that the tax rate and annual wage limitation applicable would be those in force when the wages were paid and the taxes withheld. Pub. L. No. 94-93, 89 Stat. 466 (1975). *See also Atchison*, 628 F. Supp. at 1435-37. This change was designed to ease the bookkeeping and administrative burdens on railroad employers by, for example, eliminating any need to apportion wages between those earned before and after a rate increase. *Id.* Thus, the 1975 amendment of the RRTA affected only the *tax rate and extent* applicable to RRTA compensation, but not the underlying liability under the RRTA. Nothing in the legislative history of this amendment indicates that Congress intended that the determination of employer and employee status under the

RRTA would be made at any time other than when the compensation was earned, as had been manifestly provided in the statutory language and regulations up to that point. The same is true of the 1983 amendments to the RRTA. Pub. L. No. 98-76, 97 Stat. 411 (1983). *See also* 1983 U.S.C.C.A.N. 729 (House Reports).

Moreover, FICA and the RRTA are clearly complementary taxing statutes for essentially parallel retirement/disability systems (*i.e.*, Social Security and Railroad Retirement), where remuneration for employment (or services rendered) is taxable under one of the two systems, but not both. This scheme is effected by I.R.C. § 3121(b)(9), which exempts from the definition of "employment," under FICA, "service performed by an individual as an employee . . . as defined in section 3231 [of the RRTA.]" Because FICA taxes are only imposed on "wages . . . with respect to employment," I.R.C. §§ 3101(a) & (b), 3111(a) & (b), the exclusion of work as a railroad employee from "employment" means that wages for that railroad work are not taxed under FICA. The obvious reason is because those wages are taxed under the RRTA.

The language of I.R.C. § 3121(b)(9), *i.e.*, "service *performed . . . as an employee* [under the RRTA]" (emphasis added), makes clear that at least for the purposes of FICA the employment relationship under the RRTA must be evaluated at the time the services were "performed." Given this premise, the same must also be true for the purposes of the RRTA, else a discontinuity would exist between the two taxing statutes. For example, if a railroad employee left the employ of his railroad employer and thereafter received a paycheck, under plaintiff's

interpretation of the RRTA, those wages would not be subject to the RRTA taxes. However, pursuant to the plain language of I.R.C. § 3121(b)(9), those same wages would also not be taxable under FICA because the services were "*performed* . . . as an employee" as defined in I.R.C. § 3231(b) ("any individual in the service of one or more [railroad] employers for compensation"). Thus, on plaintiff's hypothesis, what was most certainly remuneration for employment (a paycheck for wages) would escape taxation under both statutes. In setting up these complementary and parallel statutory schemes, Congress most certainly did not intend such a result. The conclusion therefore follows that under both FICA and the RRTA the railroad employment relationship must be evaluated *at the time the services were performed and the compensation earned.*

Finally, we note that the legislative history of the RRTA indicates that from the outset it has been the intent of Congress that the tax shall be levied on compensation paid *for services rendered* as an employee to an employer, notwithstanding the parties' relationship at the time of eventual payment. The regulations confirm and give effect to this congressional intent. The court, therefore, looks to *the time at which the services were rendered* to determine whether or not CMC's predecessors and the payment recipients were an "employer" and "employees," respectively, for the purposes of the RRTA.[11/]

[11/] The court notes that even if it were to look at the time at which the payments were made to the former Milwaukee R.R. employees, it still *might* find that the Trustee and, later, CMC Real Estate, were employers because they retained ownership of five rail lines, which were leased to others until 1986.

C. *On The Undisputed Facts, Milwaukee R.R. And The Trustee Were Employers At The Time The Services Were Rendered.*

Together, I.R.C. § 3231(a) and (g) define an "employer" as any "express carrier, sleeping car carrier, or rail carrier providing transportation subject to [the jurisdiction of the ICC]," § 3231(g), or any "trustee . . . when in possession of the property or operating all or any part of the business of any such employer," § 3231(a). Milwaukee R.R. was undoubtedly a railroad carrier until its Rail Assets were transferred to Soo Line under the APA *in 1985*. Prior to that time, Milwaukee R.R. continued to operate as a railroad, *at least until the beginning of 1985*, which embraced the entire wage reduction period, *i.e.*, 1982 through 1984. In addition, upon appointment in 1978 by the reorganization court, the Trustee became an employer and continued in such capacity at least until the beginning of 1985 because he was "in possession of the property or operating all or any part of the business of" a rail carrier employer. I.R.C. § 3231(a).

"On April 2, 1985, the ICC formally recognized that '[Milwaukee R.R.] is no longer operating as a common carrier railroad'. . . ." Jt. Stip. ¶ 33. Previously, on February 19, 1985, the reorganization court approved the APA, under which Milwaukee was to transfer all of its Rail Assets to Soo Line. Furthermore, on November 25, 1985, the Trustee transferred all title and interest in Milwaukee R.R.'s property back to Milwaukee R.R., which was renamed CMC Real Estate. Therefore, from the appointment of the Trustee until the Rail Assets of Milwaukee R.R. were transferred to Soo Line, the Trustee was

in possession of the property of, and Milwaukee R.R. was, a carrier subject to ICC jurisdiction. *See* I.R.C. § 3231(a) & (g).

Accordingly, we hold that from 1982 to the end of 1984, the time during which the payees performed services at a reduced wage, entitling them to receive the 1985 and 1986 payments, both Milwaukee R.R. and the Trustee were employers within the contemplation of the RRTA. Counsel for CMC conceded as much at trial. Tr. 53, 54.

D. *On The Undisputed Facts, The Payees Were Employees At The Time The Services Were Rendered.*

I.R.C. § 3231(b) defines an "employee" as "any individual in the service of one or more employers for compensation." We have already found that Milwaukee R.R. was an employer from 1982 through 1984. Furthermore, it is patently clear and indisputable that the payees were in the service of Milwaukee R.R. for compensation, pursuant to the WRA, during that time frame. Therefore, on this record it is irrefutable that the recipients of the two payments at issue in this case were "employees" under the RRTA when the services were rendered and in connection with the receipt of the payments therefor, and we so hold.

Accordingly, we hold that CMC is *not* entitled to a refund of RRTA taxes because they were properly paid on compensation for services rendered to an employer by its employees between 1982 and 1984.

E. *A Final Note*

As a last ditch, catch-all argument, CMC contends that the statutory obligations of the RRTA are imprecise and specu-

lative. As such, plaintiff maintains that this ambiguous statute must be construed in favor of the taxpayer. Accordingly, CMC alleges that it is entitled to a refund of the RRTA taxes at issue before the court because the RRTA and associated regulations did not give it adequate notice of its withholding obligations. The court does not disagree with plaintiff that, as a general rule, "if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Xerox Corp. v. United States*, 41 F.3d 647, 658 (Fed. Cir. 1994) (internal quotation marks and citations omitted). However, in this case, we simply find no reasonable doubt as to the proper interpretation and application of the RRTA based on, *inter alia*, "the clear import of the language used." *Gould v. Gould*, 245 U.S. 151, 153 (1917). *See also Xerox*, 41 F.3d at 658 ("the starting point is the words of the statute").

In connection with this argument, CMC relies heavily on the *Central Illinois* line of cases. *See Central Ill. Public Service Co. v. United States*, 435 U.S. 21 (1978); *McGraw-Hill, Inc. v. United States*, 623 F.2d 700 (Ct. Cl. 1980); *Hotel Conquistador Inc. v. United States*, 597 F.2d 1348 (Ct. Cl. 1979); *General Elevator Corp. v. United States*, 20 Cl. Ct. 345 (1990). *See also Sims v. United States*, 756 F. Supp. 1048 (M.D. Tenn 1991); *Western Reserve Academy v. United States*, 619 F. Supp. 394 (N.D. Ohio 1985), *aff'd* 801 F.2d 250 (6th Cir. 1986) (adopting the trial court's opinion). These cases generally stand for the proposition that "[b]ecause the employer is in a secondary position as to liability for any tax of the employee, . . . the employer's obligation to withhold [must] be precise and not speculative." *Central Ill.*, 435 U.S. at 31. Therefore, where the employer, viewing the statute and

contemporaneous regulations, could not "reasonably suspect that withholding obligation existed," that employer is entitled to a refund of withholding taxes assessed against it by the IRS. For the reasons explicated below, we hold that the *Central Illinois* line of precedent is inapposite to the facts at bar. Furthermore, on the facts at bar, we find that based on the totality of the applicable law in 1985 and 1986, plaintiff should have "reasonably suspect[ed]," and in fact did so suspect, that the RRTA was applicable to the payments at issue here.

First, it bears mentioning that none of the cited cases deals with the RRTA, which is at the center of this dispute. Second, and perhaps most significantly, in every single one of the cases cited by plaintiff, the taxpayer *failed* to withhold taxes, was subsequently assessed by the IRS for a deficiency, paid the assessed withholding taxes, and then brought suit for a refund.[12/] At bar, of course, plaintiff's predecessors (*i.e.*, CMC Real Estate and the Trustee) *voluntarily withheld and paid* the RRTA taxes, *sua sponte*, withhold any prodding from the government. Given this situation, a significant factual distinction from the cited

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12/ *Hotel Conquistador* involved the unusual situation where the em-ployer had paid FICA taxes on meals provided to its employees, valuing those meals at 45 cents apiece. The IRS contended that the meals were worth $1.25 each and assessed a deficiency against the taxpayer. However, because plaintiff had not filed a timely refund claim for the taxes paid on the 45 cents, only the assessed deficiency on the excess of $1.25 over 45 cents was at issue in the substantive discussion. Indeed, the Court of Claims held that "the employer should not be *assessed* for not *withholding* unless" its obligation to do so was precise and not speculative. 597 F.2d at 1354 (emphasis added). This case also involved the Federal Unemployment Tax Act (FUTA) which is imposed solely on the employer and, therefore, does not involve any withholding from the employees.

cases, the court is hard-pressed to take plaintiff's argument, that it did not have adequate notice of "what [it was] supposed to do and why," seriously. *McGraw-Hill*, 623 F.2d at 705. Plaintiff did in fact do, *sua sponte*, what it was supposed to do.

Apparently, it did not occur to plaintiff until several years after the first payment (administrative claims were filed on April 22, 1988), probably on review by learned counsel, that it might make a colorable argument that RRTA taxes were not owed. In this "offensive" posture, as opposed to what we might call the "defensive" posture of the taxpayers in *Central Illinois* and its progeny, where taxpayers were in effect defending against an assessment of deficiency by the IRS, plaintiff may not rely on what the Claims Court has termed "the notice requirement," *General Elevator*, 20 Cl. Ct. at 352, but must instead show that, under the law as applied to the facts of the case, the taxes were *incorrectly* paid. "Notice" is simply not an issue in this case, on these facts.

Third, the principle espoused in the *Central Illinois* line of cases applies expressly to the employer's "withholding obligation" for which it is "in a secondary position as to liability." 435 U.S. at 31-32. Indeed, *Central Illinois* itself involved only federal income tax withholding, for which there is no employer portion, and was specifically premised on the employer's secondary liability for withholding taxes. At bar, plaintiff was not held secondarily liable for its employees' taxes. Rather, the employees paid their own taxes through withholding. As was intimated earlier, it is not yet even certain whether plaintiff on this record is entitled to bring a claim for the employees' share of the RRTA taxes, and, at any rate, plaintiff would be required to remit any refund of the employees' taxes to them. As to the

employer share of the RRTA taxes, plaintiff was in a position of primary liability and, therefore, there was no *withholding* obligation. As a consequence, *Central Illinois* is inapplicable with respect to the employer portion.

Some later cases have applied the *Central Illinois* principle beyond the income tax withholding context to FICA taxes, for which there is an employer and employee share. *Hotel Conquistador*, 597 F.2d 1348; *General Elevator*, 20 Cl. Ct. 345; *Western Reserve*, 619 F. Supp. 394. Even in these cases, however, the courts have emphasized that "the employer should not be assessed for *not withholding* unless" the *withholding obligations* were precise and not speculative. *See e.g., Hotel Conquistador*, 597 F.2d at 354 (emphasis added). Citations to the *Central Illinois* case have been consistent with this emphasis on the employer's withholding obligation. Therefore, even if the court were convinced (and it is not) that plaintiff did not have clear and precise notice of its *withholding obligations*, we still might find that plaintiff was liable for the employer portion of the RRTA, as "the notice requirement" only applies to withholding obligations.

The sole purpose of this extended discussion has been to squarely meet and refute each of plaintiff's arguments. For the reasons stated above, the cases cited by plaintiff are inapposite to the facts at bar. Furthermore, the simple fact of the matter is that, as noted throughout this opinion, the RRTA and the regulations applicable in 1985 and 1986 gave ample notice to reasonably suspect that RRTA taxes were owed on the payments at issue. Indeed, as we have held, plaintiff correctly withheld and paid all the applicable taxes, thus the refund posture of this case.

II. *The Government's Entitlement to an Offset*

Given our adverse resolution of plaintiff's prima facie case, holding that CMC is *not* entitled to recovery of any of the RRTA taxes it paid, we need not address defendant's counterclaim for an offset as that issue is now moot. Stated differently, there is nothing to offset.

III. *Evidentiary Issues*

At trial, the court reserved ruling on the admissibility of Defendant's Exhibits 8-12, for identification. We now address those documents. Defendant's Exhibit 8 is a letter (with attachment) from CMC Real Estate's Assistant Manager of Taxes, R.M. Benton, to the Railroad Retirement Board. Plaintiff objects to the admissibility of this letter, as well as to the other exhibits objected to, on the grounds of relevancy and hearsay. JX at 10-14. The government, in response, contends that this document is relevant because it contains CMC Real Estate's admission that the 1985 and 1986 payments to former railroad employees were subject to RRTA taxes, *id.* at 10, and, as an admission of a party, defendant contends that this out-of-court statement is, by definition, not hearsay. *See* Fed. R. Evid. 801(d)(2). Whether or not the payments at issue in this case were subject to the RRTA is a question of law, not of fact, which is the province of the court to decide. Because defendant does not proffer the proposed document to prove any underlying facts, but merely an ultimate legal conclusion, said exhibit is not probative on any relevant issue of fact. Accordingly, on this proffer, the court denies defendant's motion to admit Defendant's Exhibit 8.

As to Defendant's Exhibit 9, a motion to dismiss or for summary judgment filed by CMC Real Estate in the reorganization court, the government argues that said memorandum is relevant to show that the sale of Milwaukee R.R.'s Rail Assets was not consummated until after the September 1986 payment. JX 1 at 11. Given our resolution of the fundamental question of statutory interpretation in this case, that is, that the employment relationship of the payor and the payee must be evaluated at the time the services were rendered (and the compensation earned), it is irrelevant whether the consummation date of the sale of the Rail Assets was in early 1985, as contended by plaintiff, or after September 1986. Therefore, we also sustain the objections to admit Defendant's Exhibit 9 into evidence on the grounds that it is not relevant.

Finally, defendant maintains that Defendant's Exhibits 10-12, for identification, are relevant to establish that a unit of plaintiff was an RRTA "employer" at all relevant times (including 1985 and 1986). JX 1 at 12-14. Again, because we hold that the determination of "employer" status in this case must be made at the time the services were rendered (*i.e.* 1982-84), the proffered exhibits are irrelevant to that issue.[13/] Consequently, on this premise, defendant's motion to admit Defendant's Exhibits 10-12 for identification is hereby denied.[14/]

[13/] Defendant has filed, on April 16, 1996, a Motion for Leave To Submit Additional Argument on the admissibility of these exhibits, wherein defendant admits that Defendant's Exhibits 10-12 are irrelevant on this very basis. Consequently, defendant's motion for leave must be denied as moot.

[14/] Defendant objected to the admissibility of Plaintiff's Exhibits 1 through 5, for identification, which objections were sustained without prejudice to

CONCLUSION

Plaintiff is incorrect as a matter of law in its fundamental premise that the time of the payment is the correct time for determining the employer/employee relationship under the RRTA. We hold that the court must look to the time at which the services were performed (and the compensation earned) to determine whether the taxpayer was an employer and whether the payees were employees pursuant and subject to the RRTA. On the undisputed facts before the court, both the Trustee and Milwaukee R.R. were clearly employers during January 1, 1982 to January 1, 1985. Similarly, the payees were undoubtedly employees of Milwaukee R.R. during that same time period. Because the 1985 and 1986 payments were compensation, as statutorily defined, for services rendered in 1982, 1983, and 1984 by employees to their employer, the payments were subject to taxation under the RRTA. As the taxes at issue in this refund suit were correctly paid, CMC has failed to prove that it is entitled to a refund. Since no refund is legally due, there is nothing to offset, and that issue is, therefore, moot. Accordingly, the Clerk shall enter judgment dismissing this case. In addition, Defendant's Motion For Leave To Submit Additional Argument is hereby denied. *See* note 13, *supra*. Costs against the plaintiff to the defendant.

IT IS SO ORDERED.

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plaintiff's right to renew if plaintiff prevails on the substantive liability issue (*i.e.*, that it is not subject to the tax and is entitled to a refund) because those exhibits had been proffered solely to show the precise amount of RRTA tax paid and were, thus, premature. Tr. 13, 21, 35.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5051

CHICAGO MILWAUKEE CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: November 8, 1994

Before NEWMAN, PLAGER, and RADER, *Circuit Judges*.

RADER, *Circuit Judge*.

Chicago Milwaukee Corporation (CMC) sought a refund of railroad retirement tax overpayments it made on behalf of itself and former employees. CMC did not certify that it had first repaid the employees, or obtained their consent to seek a refund. The United States Court of Federal Claims dismissed, holding that it had no jurisdiction absent this certification.

Because CMC need not repay the employees, or obtain their consent, until the Court of Federal Claims evaluates CMC's claim, this court reverses and remands.

BACKGROUND

CMC is the successor in interest to a railroad that went bankrupt in 1977. During reorganization, the railroad's employees agreed to wage concessions in return for proceeds from any sale of the railroad's assets. CMC's predecessor sold the assets in 1985. Some eight thousand employees received their share of the proceeds in distributions in 1985 and 1986.

CMC or its predecessor paid taxes on both distributions under the Railroad Retirement Tax Act (RRTA), I.R.C. §§ 3201-3233 (1988 & Supp. V 1993). RRTA tax is similar to the tax imposed by the Federal Insurance Contributions Act (FICA), I.R.C. §§ 3101-3128 (1988 & Supp. V 1993). RRTA tax is an employment excise tax on the employer and the employee. The employer pays both portions, withholding the employee's portion from his wages. I.R.C. §§ 3201, 3202(a), 3221 (1988 & Supp. V 1993). CMC paid RRTA taxes on the distributions totalling $7.5 million on its own behalf and $3.6 million on behalf of the employees.

Later, CMC decided that it was no longer an RRTA "employer" after the assets sale. CMC concluded that RRTA did not apply to the resulting distributions. CMC filed a refund claim with the Internal Revenue Service (IRS) in 1988 for both its and the employees' portions of the RRTA payments. CMC did not repay the employees or obtain their consent before filing the claim.

The IRS did not act on CMC's claim. In 1992, CMC filed a refund suit in the Court of Federal Claims. That court dismissed for lack of subject matter jurisdiction. *Chicago Milwaukee Corp. v. United States*, 27 Fed. Cl. 777 (1993). CMC appeals.

DISCUSSION

This court reviews a dismissal for lack of subject matter jurisdiction *de novo*. *Booth v. United States*, 990 F.2d 617, 619 (Fed. Cir. 1993).

I.

CMC brought suit under I.R.C. § 7422(a) (1988). Section 7422(a) waives the United States' sovereign immunity from refund suits. *United States v. Michel*, 282 U.S. 656, 658 (1931), provided the taxpayer has previously filed a qualifying administrative refund claim. To qualify, the refund claim must accord with "the provisions of law [regarding refund claims], and the [Treasury] regulations . . . established in pursuance thereof." I.R.C. § 7422(a).

Section 7422(a) thus imposes, as a jurisdictional prerequisite to a refund suit, filing a refund claim with the IRS that complies with IRS regulations. *Burlington Northern, Inc. v. United States*, 684 F.2d 8666, 868 (Ct. Cl. 1982). For example, the refund claim must detail each claimed ground for a refund, and provide sufficient facts to apprise the IRS of its basis. Treas. Reg. § 301.6402-2(b)(1) (1994). *See, e.g., Boyd v. United States*, 762 F.2d 1369, 1371-72 (9th Cir. 1985) (rejecting refund claim that did not adequately apprise IRS of basis for claimed deduction of gambling expenses).

II.

The question in this case is whether Treas. Reg. § 31.6402(a)-2(a)(2) (1994) imposes a jurisdictional requirement under I.R.C. § 7422(a). The regulation provides:

> Every [administrative] claim filed by an employer for refund or credit of [RRTA] tax . . . collected from an employee shall include a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund. . . .

Section 31.6402(a)-2(a)(2). This regulation requires an employer seeking a refund of the employee portion of RRTA taxes to certify employee repayment or consent.

Section 31.6402(a)-2(a)(2) does not, however, impose a deadline for certification. The regulation specifies that the claim "shall include" certification, but the regulation does not specify when the employer must provide the certification. On its face, the regulation neither requires nor prohibits including the certification at the time of filing.

Section 31.6402(a)-2(a)(2) does not indicate whether the refund claim must include the certification when filed, or whether the employer may provide certification after filing. If certification need not accompany the claim when filed, then section 31.6402(a)-2(a)(2) does not impose a jurisdictional filing requirement under section 7422(a).

This court's predecessor construed section 7422(a) as a notice provision, suggesting that section 31.6402(a)-2(a)(2)

certification need not accompany the refund claim when filed. *Burlington*, 684 F.2d at 868-69. In *Burlington*, the Court of Claims held that section 7422(a) requires only that the taxpayer provide fair notice of his asserted grounds for a refund. The purpose of jurisdictional requirements imposed by regulation under section 7422(a) is "to prevent surprise and to give adequate notice" to the IRS. *Id.* at 868; *Boyd*, 762 F.2d at 1371. "If a claim fairly apprises the [IRS] of the ground on which recovery is sought, then the claim is adequate for the purposes of bringing suit under section 7422(a)." *Burlington*, 684 F.2d at 869.

Burlington militates against treating section 31.6402(a)-2(a)(2) as imposing a jurisdictional requirement. Whether an employer has repaid the employee portion or obtained consent provides no information about whether an overpayment of RRTA taxes in fact occurred. Thus, certification of repayment or consent plays no part in "fairly appris[ing] the [IRS] of the ground on which recovery is sought." *Burlington*, 684 F.2d at 869. If a party submits the certification after filing, it will not surprise the IRS as to the basis for the claim. *Id.* at 868. Treating section 31.6402(a)-2(a)(2) as jurisdictional thus would not advance the policies expressed in section 7422(a).

III.

This court's predecessor held that a statute imposing a similar certification requirement did not require certification on claim filing. *IBM v. United States*, 343 F.2d 914, 915-18 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966). In *IBM*, the government levied an excise tax on computer sales. IBM filed a refund claim with the IRS, contending that the excise tax was

invalid. However, IBM did not certify, under I.R.C. § 6416(a)(1)(C) (1988), that it had repaid the tax to the computer purchasers or obtained their consent. Section 6416(a)(1)(C), like Treas. Reg. § 31.6402(a)-2(a)(2), requires certification, but does not indicate whether a claim must include certification when filed.

When IBM ultimately sued, the government moved to dismiss for lack of the required certification. The court refused to dismiss, because requiring certification on claim filing would impose substantial hardship without advancing the purpose of the certification requirement. *IBM*, 343 F.2d at 915-18.

This court's predecessor reasoned that the certification requirement prevents a manufacturer from reaping a windfall by recovering taxes already passed on to its vendee. *IBM*, 343 F.2d at 918. Compliance at any time before the refund issues would meet this purpose:

> *For this end, the important moment would be the time of actual refund, not the institution of the action. . . .* No meaningful interest would be advanced . . . by a technical demand that the consents which are to be recognized must all have been collected at the time of suit or when the cause of action first accrued.

Id. (emphasis added). The Court of Claims thus found no reason to impose an earlier deadline for certification of repayment or consent than "the time of actual refund." *Id.*

This court's predecessor did find good reasons not to impose an earlier deadline:

> In this case, for example, there are upwards of 3,000 separate customers to whom taxpayer passed on the tax during the critical years. It is sensible to insist that, if plaintiff wins, no refund for any particular tax be given until the necessary consent is filed, but *it is less sensible to demand that the taxpayer undertake the burden of gathering all the consents before the tribunal has even had a chance to decide whether there can be any recovery at all.*

IBM, 343 F.2d at 918 (emphasis added). Requiring certification of repayment or consent when a taxpayer files a refund claim would impose a heavy burden, discouraging pursuit of an uncertain refund. This court detects no justification for imposing such a burden. Indeed, *IBM* noted that even the IRS "has already accepted the position we adopt." *Id.* (citing Rev. Rul. 58-563, 1958-2 Cum. Bull. 892, 893).

Although I.R.C. § 6416(a)(1)(C) and Treas. Reg. § 31.6402(a)-2(a)(2) are not identical in phrasing, the basic thrust of the court's view in *IBM* controls here as well.

IV.

The IRS has stated that it views the specific certification requirement at issue here as non-jurisdictional. IRS General Counsel Memorandum (GCM) 38,786, 1981 IRS GCM LEXIS 22 (Aug. 13, 1981). GCM's "function as a body of 'working law'" within the IRS. *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 683 (D.C. Cir. 1981). GCM 38,786 addresses an employer refund claim for overpayment of the employer and employee portions of FICA taxes. FICA taxes,

like RRTA taxes, are subject to section 31.6402(a)-2(a)(2). *Id.* at *6-7. A counsel in an IRS regional office suggested rejecting the claim for failure to include certification of employee repayment or consent. *Id.* at *19-20.

The IRS General Counsel instead held that employers need not provide certification when filing. *Id.* at *26. The General Counsel noted that certification is "merely supporting evidence, which does not have to accompany the claim but which must be presented to the [IRS] before the [IRS] can actually issue a refund." *Id.* at *20. The General Counsel recognized, consistent with *Burlington*, that "a claimant cannot be deprived of his substantive rights if he familiarizes the Service with the essence of his claim." *Id.* at *24 (citing IRS GCM 31,499 (Jan. 28, 1960)). The General Counsel concluded:

> [A] claim for refund of overpaid FICA taxes is a valid claim even though at the time the claim is filed the employer has not made any effort to repay or reimburse the employees for the amount of over-collected tax or to secure the employees' consents to the allowance of a refund to the employer.

Id. at *26.

V.

The Court of Federal Claims erred by dismissing CMC's claim. Requiring CMC to compensate eight thousand former employees, or secure their consent, before filing a refund claim imposes a harsh burden without good reason. CMC may demonstrate compliance with section 31.6402(a)-2(a)(2) after

the Court of Federal Claims determines whether CMC is a railroad "employer."

CMC may proceed with its suit for a refund of the employer and employee portions of RRTA taxes. Accordingly, this court does not reach whether an employer may claim a refund of the employer portion alone.

CONCLUSION

An employer need not repay its employees or secure their consent before claiming a refund for overpayment of the employee portion of RRTA taxes. On remand, the Court of Federal Claims will have the opportunity to address the merits of CMC's claim before requiring compliance with Treas. Reg. § 31.6402(a)-2(a)(2).

COSTS

Each party shall bear its own costs.

REVERSED AND REMANDED

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 92-462T

(Filed: November 8, 1993)

CHICAGO MILWAUKEE CORPORATION,	) Motion to dismiss; 26 U.S.C.) § 7422 - jurisdictional pre-) requisite to tax refund suit;
Plaintiff	) 26 U.S.C. § 6413 - special) rules for adjustment of
v.	) overpayment of employment) taxes under FICA and RRTA
THE UNITED STATES,	) and applicable regulations.
Defendant	)

Larry D. Blust, Chicago, Illinois, attorney of record for plaintiff.

George L. Squires, Washington, D.C., with whom was *Acting Assistant Attorney General Michael L. Paup*, for defendant.

OPINION

REGINALD W. GIBSON, *Judge*:

INTRODUCTION

The merits of this case relate to plaintiff's suit to recover employment taxes imposed by the Railroad Retirement Tax Act[1] ("RRTA") which were, allegedly, overpaid.[2] However, presently before the court is defendant's motion to dismiss the amended complaint for lack of subject matter jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted under RCFC 12(b)(1) and (4), respectively. The government asserts as a basis for its motion taxpayer's non-compliance with applicable Treasury regulations in its administrative refund claims by failing to either reimburse its former employees or secure their written consent to allowance of the refund prior to filing the claim. Defendant argues that such compliance is a prerequisite to a tax refund suit, the lack of which is fatal in that it deprives any federal court of subject matter jurisdiction to hear the case. Conversely, plaintiff argues that such compliance is not required and, in any case, should not bar this particular suit based on its facts. For the reasons discussed below, defendant's motion to dismiss is hereby granted.

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[1] 26 U.S.C. § 3201 imposes a tax on every employee for income received for services rendered during the calendar year. 26 U.S.C. § 3221 imposes a similar tax on employers based on compensation paid to employees for services rendered during the calendar year.

[2] In its amended complaint, taxpayer demands refunds for both the alleged overpaid employer's portion of the tax and the employees' portion which was withheld from the employees' gross pay and submitted to the IRS on their behalf.

FACTS

Because the operative facts are essentially undisputed and must, in any event, be taken as true as alleged by the *non*-moving party in a motion to dismiss,[3] the pertinent facts are, therefore, ascertained for the most part from plaintiff's amended complaint.[4]

On December 9, 1977, Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Railroad") entered into re-organization proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, and a trustee was appointed by that court to operate it. Subsequently, the trustee, on behalf of Railroad, entered into a labor agreement on or about January 29, 1982, with the various unions representing employees of Railroad, which had been approved by the district court. Under the plan, the employees were to receive a percentage of any profit realized by Railroad upon sale of the company's assets, if and when such a sale occurred, in reimbursement for the wage reduction agreement.

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[3] *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (allegations in the complaint should be construed favorably to the pleader); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

[4] In its motion to dismiss and brief in support, defendant annexed and relied on materials referred to in plaintiff's complaint in support of its allegations. As decision may be reached here on the pleadings alone, it is unnecessary to convert the government's motion into one for summary judgment under RCFC 56. Accordingly, as impliedly permitted by RCFC 12(b) and (c), such materials are excluded from consideration here.

Following thereafter, on February 19, 1985, the district court approved the Asset Purchase Agreement ("APA") between the trustee, on behalf of Railroad, and the Soo Line Railroad Company and its affiliate, SLRCO, Inc. (hereinafter collectively referred to as "Soo"). The district court's order also provided that all common carrier obligations would be assumed by Soo and cease as to the trustee and the debtor, Railroad, upon consummation of the transaction, which occurred that day. As a result of the order and sale, virtually all of the employees of the trustee and Railroad became employees of Soo. The trustee paid all wages accruing prior to the sale date (February 19, 1985), and Soo met the wage obligations thereafter.

Several months later, on October 15, 1985, the trustee paid the former employees of Railroad a portion of the proceeds from the sale of assets to Soo, after deducting from each recipient's share the appropriate amount of employment taxes imposed upon wage recipient railroad employees by the RRTA. Shortly thereafter, on October 18, 1985, the trustee paid to the Internal Revenue Service *both* the employer's and the employees' shares of RRTA taxes in amounts totalling $4,872,260.14 and $2,471,822.42, respectively. In April of the following year, the appropriate form (CT-1) reflecting both the 1985 sale proceeds payments and the tax deposit was filed with the IRS.

Pursuant to the Final Decree and Consummation Order of the district court, dated November 25, 1985, the trustee then transferred all rights, title and interest in the assets remaining in the estate back to the debtor, Railroad, which was renamed CMC Real Estate Corporation ("Real Estate"). As successor in interest to Railroad and the trustee, Real Estate paid the former

Railroad employees the second and final portion of the asset sale proceeds on September 30, 1986. As with the first payment made by the trustee, *supra*, Real Estate deducted from each recipient's share the proper amount of RRTA employment taxes for which liability arose from the satisfaction of the deferred wage obligation. On October 3, 1986, Real Estate similarly remitted *both* the employer's and the withheld employees' shares of RRTA taxes, attributable to the transaction, to the IRS in amounts of $2,627,871.53 and $1,367,981.22, respectively. In January 1987 Real Estate filed form CT-1 with the IRS reflecting the second payment of the asset sale proceeds and the tax deposit.

On or about April 22, 1988, Real Estate timely filed claims for refund with the IRS for both the employer's and employees' shares of RRTA taxes allegedly overpaid in connection with the distribution of the sale proceeds to the employees. In its response to the instant motion, plaintiff states that, at the time of filing the administrative claim(s) with the IRS, it contemporaneously notified Railroad's former employees that they should claim a credit on their individual federal income tax returns for the net amount overpaid by each. In that connection, taxpayer alleges in its amended complaint, upon information and belief, that *most* of the employee recipients of the 1985 and 1986 asset sale proceeds have "received a refund of the employees' share of the railroad retirement tax through credits on their own federal income tax returns."

CMC Real Estate Corporation was then liquidated on November 30, 1989, and all of its assets, including the outstanding refund claims, were transferred to its parent company,

Chicago Milwaukee Corporation ("CMC"), the real party in interest before the court. More than six months after the filing of the administrative refund claim,[1] on or about July 9, 1992, and without having received notification from the IRS as to a ruling on said claim, CMC filed suit in this court against the United States for refund of the allegedly overpaid employer *and employee* railroad taxes.

ISSUE

The sole issue presented by defendant's motion to dismiss is—whether the regulations referred to in § 7422 of the Internal Revenue Code ("IRC" or "the Code"), *require* an employer to claim a refund for the employees' portion of railroad employment taxes when filing a claim for the employer's portion alleged to have been overpaid, and to either effect reimbursement to the employees of such overpaid amounts or secure their written consent to allowance of the refund *as a precursor* to the filing of an efficacious claim for the employer's and employees' portions.

Taxpayer maintains that neither is mandated by the regulations or the decisional case law interpreting them when the issue of overpayment is disputed by the government. However, CMC Real Estate (CMC's predecessor in interest), did file for refund of the employees' portion of the allegedly overpaid taxes along with its claim for the employer's portion, in what it called "an abundance of caution."

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[1] *See* 26 U.S.C. § 6532(a)(1) (1989).

Conversely, defendant contends that plaintiff failed to comply with § 6413 and Treas. Reg. §§ 31.6402(a)-2(a)(2)(i), 31.6413(a)-1(b), and 31.6413(a)-2(a), in that it:

(i) failed to refund to its employees the excessive amounts of RRTA taxes plaintiff alleges it withheld from their wages in 1985 and 1986;

(ii) failed to request from its employees their written consents to plaintiff's filing claims against the government for refund of their RRTA taxes on their behalf; and

(iii) failed to credit the alleged overpayments of its employees' RRTA taxes for 1985 and 1986 against later payroll taxes. These are, aver defendant, mandatory prerequisites both to maintaining any tax refund action against the United States, and to making any claim upon which relief can be granted.

An examination of the Treasury regulations is therefore warranted.

DISCUSSION

"Taxpayer suits for refunds are governed, in part, by the principles of sovereign immunity." *Mallette Bros. Constr. Co. v. United States*, 695 F.2d 145, 155 (5th Cir. 1983). It is well established that suits in derogation of sovereign immunity must adhere strictly to the conditions by which the sovereign allows it. *See, e.g., United States v. Michel*, 282 U.S. 656, 659 (1931). "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with." *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*,

254 U.S. 141 (1920) (Holmes, J.). Additionally, where the court, as here, is addressing a motion to dismiss, the general rules respecting same were recently summarized in *Executive Court Reporters, Inc. v. United States*, No. 93-4C, slip op. 6-7 (Fed. Cl. Nov. 1, 1993), as follows:

> When evaluating a motion to dismiss for lack of subject matter jurisdiction and for failure to state a cause of action upon which relief can be granted, the allegations of the complaint should be construed favorably to the pleader, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), to the end that the court must accept as true the facts alleged in the complaint. *See also Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988), *W.R. Cooper General Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed. Cir. 1988). The central issue in evaluating such a motion "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . ." *Scheuer*, 416 U.S. at 236.
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> Plaintiff bears the burden of establishing jurisdiction. *Reynolds*, 846 F.2d at 748 (citing cases). Dismissal is appropriate only if "it is beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). For purposes of passing on a motion to dismiss pursuant to RCFC 12(b)(1), the court is not confined to an examination

of the complaint. Instead, the court may consider "evidentiary matters outside the pleadings." *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986) (citations omitted).

While the United States has long consented to tax refund suits, it has clearly conditioned that consent upon the prior filing with the Secretary of an administrative claim made in accordance with the relevant provisions of law and the regulations promulgated by the Secretary. 26 U.S.C. § 7422 (1989);[6/] *Sun Chem. Corp. v. United States*, 698 F.2d 1203, 1206 (Fed. Cir. 1983) ("It is a well established rule that a timely, sufficient claim for refund is a jurisdictional prerequisite to a refund suit."); *Mertens v. United States*, 12 Cl. Ct. 678, 679 (1987) ("In tax refund cases, permission to sue . . . is conditioned upon a claim for refund having been 'duly filed.'").

1. *The Relevant Regulations.*

Treas. Reg. § 31.6402(a)-2(a) governs credits or refunds of Federal Insurance Contributions Act (FICA) and RRTA taxes. Paragraph (a) allows any person who pays more than the correct

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6/ The statute states in relevant part:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

26 U.S.C. § 7422(a).

amount of employee and employer portions of FICA or RRTA taxes to file claims for both. That section states in pertinent part as follows:

> (1) *In general.* Any person who pays to the district director more than the correct amount of—
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> (ii) Employee tax under section 3201 . . . or employer tax under section 3221, of the Railroad Retirement Tax Act,
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> ******
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> may file a claim for refund of the overpayment. . . .
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> (2) . . . *Every* claim filed by an employer for refund or credit of employee tax under [FICA or RRTA] . . . collected from an employee *shall* include a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund or credit. . . .

Treas. Reg. § 31.6402(a)-2(a)(1) and (2)(i) (emphasis added). According to the regulation's plain meaning,[7] it is patently clear

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[7] *Idaho First Nat'l Bank v. Commissioner*, 997 F.2d 1285, 1289 (9th Cir. 1993) ("'legislative regulations' must be accorded their plain meaning 'where the language selected by the drafters is clear and unequivocal.'") (quoting *KCMC, Inc. v. FCC*, 600 F.2d 546, 549 (5th Cir. 1979)) (footnote omitted). *A.B. Long, Jr. v. United States*, 10 Cl. Ct. 46, 54 (1986) (stating that unambiguous Treasury regulations should be accorded their plain meaning).

The regulations at issue here are "legislative regulations" because

that compliance antecedent to the filing of a claim for refund of the employees' share of the tax is mandatory. The question remaining, then, is whether the employer *must* include a claim for the employees' excess payment in its claim for the amount the employer itself allegedly overpaid to the government. If the answer is yes, then plaintiff's claim must fail as to both portions because it undoubtedly failed to satisfy § 31.6402(a)-2(a)(2)(i).

Paragraph (a) of § 31.6413(a)-1(i) allows an employer to repay employees *overcollected* employment taxes without reporting the overcollection or paying it to the district director *if* the repayment is made *before* the appropriate returns are filed. On the other hand, if the employer does not return the money to the employees prior to filing the returns, the employer "shall" report and pay the amount to the district director. Treas. Reg. § 31.6413(a)-1(a)(1)(ii). Once the employment tax returns are filed, the employer "*shall" repay the employees if the error is ascertained within the applicable limitations period for credit or refund.* Treas. Reg. § 31.6413(a)-1(b) (emphasis added). The employer is exempted from the refund requirement if the overcollection and overpayment to the district director is "made the subject of a claim . . . for refund or credit, *and the employer elects to secure the written consent of the employee to the allowance of the refund or credit under the procedure provided in [§ 31.6402(a)-2(a)(2)(i)].*" Treas. Reg. § 31.6413(a)-1(b)(1)(i) (emphasis added). "If the employer does not repay the employee the amount overcollected, the employer shall

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Congress expressly delegated authority to promulgate such regulations to the Secretary in IRC § 7422. *Idaho Bank*, 997 F.2d at 1289 n.7. As such, unlike ordinary regulations, they have the force and effect of law. *Id.*

reimburse the employee by applying the amount of the over-collection against the employee tax which attaches to wages . . . paid to the employee prior to the expiration of the [next return period after ascertaining the error]." Treas. Reg. § 31.6413(a)-1(b)(1)(iii).

Section 31.6413(a)-1 speaks exclusively to the return of overcollected employment taxes to the employees from whom the taxes have been withheld. In fact, the regulation directs the employer who errs in its collection of such taxes to reimburse the affected employees (if discovered within applicable limitations periods), without mention of any refund from the government to the employer.[8] Additionally, each of the regulations which speaks to claims for refunds of employment taxes speaks to the employees' portion exclusively or to the employees' portion before discussing the employer's portion.[9] While "[n]either the IRC nor the regulations expressly provide that an employer who has overpaid both the employer and the employee FICA taxes must claim a refund or credit on behalf of its employees in order to obtain a refund or credit of its own overpayment," *Atlantic Dep't Stores, Inc. v. United States*, 557 F.2d 957, 958 (2d Cir. 1977), "the existing statutes and regulations *clearly imply an obligation* on the part of the

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[8] The section refers to the employer obtaining a refund only insofar as paragraph (b) permits the employer to avoid repaying the employee if the tax is the subject of a refund claim and the employer has received the consent of the employees in compliance with § 31.6402(a)-2(a)(2)(i). Such a reference in and of itself contemplates that the refund claim is being made on behalf of the employee.

[9] *See* Treas. Reg. §§ 31.6402(a)-2, 31.6413(a)-1, 31.6413(a)-2.

employer to claim a refund or credit on behalf of those employees with respect to whom the employer can reasonably adjust its overpayment." *Id.* at 959 (emphasis added).

2. *Precedent Interpreting The Regulations.*

a. *Cases Holding That Employers Must File For Employees' Claims.*

The *Atlantic* court reasoned that the requirement of § 31.6413(a)-1(b) to repay or reimburse, combined with the consent requirement of § 31.6402(a)-2(a)(2), made apparent the employer's obligation to secure a refund of both tax portions simultaneously. In support of its conclusion, the court examined the legislative history of the predecessors to IRC § 6413[10] and found that Congress intended overpayment to be corrected through adjustment of future tax collections, payments and return filings, and that it created the refund option to account for situations where such adjustment was not possible or practical. Since Congress intended for employers to adjust the overpayment whenever possible, it must have intended the employers to claim for both portions of the overpaid tax whenever that option had to be utilized. *See id.* at 960.

Lastly, the Second Circuit relied on considerations of practical reality and equity in support of its holding. First, since it is the employer who calculates, withholds and pays the government the tax—

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[10] Internal Revenue Code of 1939, §§ 1411 and 1421. *Atlantic*, 557 F.2d at 960 n.2.

> . . . it is more likely that the employer rather than its employees will discover any error with respect to an overpayment. Any error made by the employer, moreover, is likely to affect more than one employee, and, thus, since the employer periodically pays all of its employees and deducts FICA taxes from their wages, the employer is in a position to make appropriate adjustments with respect to overpayment for all of its employees in a manner which under usual circumstances should not be unduly burdensome. Whatever costs are involved in effecting proper adjustments should appropriately be borne by the employer because it was its error which resulted in the overpayment originally.

Id. at 961 (footnote omitted). As an aside, the court also gave thought to foreseeable burdens likely to be imposed upon the government if employers were not required to handle all refund claims on behalf of its employees:

> Additionally, from an administrative standpoint, it would seem to be more efficient for the IRS to process all of the employee tax overpayment claims from one employer at the same time rather than having to process each one individually when each employee submitted a claim on his own behalf or sought to claim a credit for the overpayment against his income tax pursuant to Regulation § 31.6413(c)-1.

Id. at 961 n.3.

While the *Atlantic* court applied its holding only to those employees then on Atlantic's payroll at the date that Atlantic ascertained its error,[11] the regulations' coverage was extended by *Entenmann's Bakery, Inc. v. United States*, 465 F. Supp. 1118 (E.D.N.Y. 1979), to include those employees who no longer worked for the taxpayer claiming the refund, but could nevertheless be contacted by the employer with "reasonable effort." *Id.* at 1120.

b. *Cases Where The Regulations' Requirements Were Inapplicable.*

The United States Court of Claims approved of the *Atlantic* holding in *Hotel Conquistador, Inc. v. United States*, 597 F.2d 1348 (Ct. Cl. 1979), where it dismissed the taxpayer's suit for recovery of its own portion of FICA tax payments because the taxpayer claimed its (employer) portion only, and not its employees' portion as well.

In *Hotel Conquistador*, the taxpayer supplied meals to its employees and *withheld* FICA taxes from the employees' pay for the value of the meals, which value the taxpayer set at $.45. The government disputed the correctness of the $.45 value per meal as the basis for withholding and claimed that the value of each meal was instead $1.25. As a consequence, the hotel paid *both* the employer's *and the employees'* portions of the assessed deficiency from *its* own pocket without further withholding from the employees. Thereafter, the plaintiff filed a protest defending the $.45 valuation and at the same time claiming that

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[11] "[A]n error is ascertained when the employer has sufficient knowledge of the error to be able to correct it." Treas. Reg. § 31.6413(a)-1(b)(1)(iv).

even the $.45 meals were not subject, *at all*, to FICA and FUTA[12] taxes in view of § 119, Title 26 U.S.C. While the court decided that the protest could *not* be considered an informal refund claim, as taxpayer here suggests, apparently it did so because the protest of the original FICA payments on the $.45 meal value was *made only for the employer's portion, without inclusion of the employees' portion of withheld taxes* from gross wages. The court stated, in explaining, that:

> The 1973 "protest" cannot be taken as an informal claim for refund of the FICA taxes for the reason that, if it requested any refund of the original payments, it did so only for the employer's share. Plaintiff never purported, and does not purport now, to be seeking any adjustment on account of the employees' share, which had been withheld from them, and this despite the fact that by its own theory maintained in the protest, the withholding by it was necessarily unauthorized and unlawful. Plaintiff cannot prosecute a claim for refund in that fashion.

Hotel Conquistador, 597 F.2d at 1354. Apparently, although plaintiff does not recognize it, the Court of Claims held the protest not to be an informal refund claim *because* it did not meet the requirements of the applicable regulations according to the interpretation in *Atlantic*, which the court implicitly endorsed. *Contra First Nat'l Bank of Chicago v. United States*, 964 F.2d 1137, 1141 (Fed. Cir. 1992). The refund issue regarding the $.45 was not in the background of the case as

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12/ Federal Unemployment Tax Act, 26 U.S.C. § 3301, *et. seq.*

plaintiff suggests, but rather was the focus of the refund discussion. The tax on the difference between the meals valued at $.45 and $1.25 was refunded to the hotel without much discussion in the opinion because the employees' portion of that ($1.25) assessment had in fact been paid by the hotel, without withholding from the employees. Since there was nothing to refund to the employees (because the employer had paid the tax for them), there was no refund issue as to that point. *See also id.* at 1141-42.

At bar, CMC also argues in its reply brief that "the Court of Claims clearly interpreted *Atlantic* as limited to current employees and only requiring protection of such employees' claims. (Pltf's Response to Deft's Motion to Dismiss at 15.) We think CMC misreads the Court of Claims because at no point in its opinion did the court in *Hotel Conquistador* deny the efficacy of the prepayment requirement when it adopted the Second Circuit's holding and rationale as follows:

> In *Atlantic Department Stores v. United States*, 557 F.2d 957 (2d Cir. 1977), it is held that the claim for refund must show that the employee has, *if feasible*, been reimbursed for the tax overpayment collected from him. . . . It seems a clearly equitable requirement since *the employer should not be allowed to correct its own error as affecting its own pocket, but not as affecting the employee's.*

Id. at 1354-55 (emphasis added). Moreover, *Atlantic* clearly holds "that only when such an adjustment cannot be made should the employer be permitted to claim a refund." *Id.* at 960.

Over one year after *Hotel Conquistador*, the Court of Claims decided a closely-related, but distinct issue in *Hospital Data Center of S.C., Inc. v. United States*, 634 F.2d 541 (Ct. Cl. 1980). That court implicitly reaffirmed *Hotel Conquistador* (where it paid both employer and employee portions of taxes on the $1.25 meal value) when it held that an employer may sue solely for recovery of its own portion of social security taxes without suing for recovery of its employees' tax remittance. In *Hospital Data*, the court distinguished between the regulations' requirements for administrative refund claims and suit to obtain a refund. While IRC § 7422 explicitly requires compliance with the Secretary's regulations prior to the assumption of jurisdiction by any federal court in a tax refund suit, once such compliance has been secured, the Code contains no similar guidelines, conditions or restrictions (outside of the RCFC or the FRCP) governing what claims he must bring or how a plaintiff must otherwise conduct his suit.

Plaintiff relies heavily on the Court of Claims' statement in *Hospital Data*. However, plaintiff asserts from the case a proposition for which it does not stand. In *Hospital Data*, the taxpayer complied in all respects with the regulations governing employment tax refunds. The government admitted that the taxpayer had secured the written consents of its employees for allowance of the credit, Deft's Reply To Pltf's Response To Deft's Motion To Dismiss App. at 21 (Deft's Reply Brief at 14, *Hospital Data* (No. 610-77)), and the court noted that Hospital Data did thereafter file administrative refund claims on behalf of its employees, along with its own claim, in accordance with the regulations. *Hospital Data*, 634 F.2d at 546 n.17. As the

letter of the regulations had been complied with, the jurisdictional prerequisite to maintenance of the refund suit contained in § 7422 had been satisfied. At that point, the plaintiff was free to file its suit, making any claims it chose to make and eliminating those it preferred not to make. The Court of Claims did not, then, as CMC boldly asserts, reject the *Atlantic* rationale. It briefly stated the holdings of *Hotel Conquistador* and *Atlantic* without any language that could be even remotely construed as rejection, criticism or disapproval. The *Hospital Data* court distinguished the case before it and rejected only the notion that the strictures of the regulations extended beyond the administrative procedures that a taxpayer must follow as a condition precedent to filing suit. Taxpayer, at bar, can glean no comfort from *Hospital Data* for the simple reason that it has not complied with the threshold administrative directives applicable to its situation. Thus, it may not avail itself of the "suit after compliance" rule announced in *Hospital Data*. However, the *Hospital Data* court's implied reaffirmance of *Atlantic* and its progeny's interpretation of IRC § 7422 and Treas. Reg. §§ 31.6402(a)-2 and 31.6413(a)-1 is, of course, binding on plaintiff at bar.

While CMC's statement that *Hospital Data* is controlling precedent in the Court of Federal Claims is correct, its contention that "there is no requirement under Claims Court [sic] precedent that the employer even apply for a refund for any employee's share" and, therefore, defendant's motion should be denied is incredulous and entitled to short-shrift. First, we find that the prior cases outside of the Federal Circuit and its predecessor interpreting the regulations are persuasive in their

analysis and logic. *E.g., Atlantic*, 557 F.2d 957; *Entenmann's*, 465 F. Supp. 1118; *Macy's New York, Inc. v. United States*, 484 F. Supp. 181 (S.D.N.Y. 1980). Second, *Hotel Conquistador*, a Court of Claims case, implicitly embraced the interpretation of the Code and regulations as espoused by the Second Circuit in *Atlantic*.

The Court of Appeals for the Federal Circuit, in *First Nat'l Bank*, also interpreted *Hotel Conquistador* as "not address[ing] procedures for obtaining a refund of FICA taxes, in particular 26 C.F.R. § 31.6402(a)-2; [but] rather, [dealing] solely with an employer's entitlement to a refund."[13] 964 F.2d at 1141. This is entirely true for the portion of employment taxes paid solely by the hotel for the deficiency assessed on the difference between the $.45 meal valuation used by the hotel and the $1.25 valuation used by the government. However, for the FICA withheld from the employees on the original $.45 valuation, the refund procedures under § 31.6402(a)-2 were directly at issue, and the *Atlantic* interpretation was clearly adopted by the Court of Claims in order for them to deny the hotel's refund claim for that portion of the tax in summary fashion. *See Hotel Conquistador*, 597 F.2d at 1356. The language from *Hotel Conquistador* quoted above, is, we believe, therefore, clearly indicative of its acceptance of *Atlantic*.

Similarly, CMC also misinterprets *First Nat'l Bank*. Contrary to plaintiff's reading, the Federal Circuit did not arrive

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[13] The Federal Circuit's statement was apparently dicta, since it considered *Hotel Conquistador* unnecessary to its decision. Such an interpretation is, therefore, not binding on this court in resolution of the issue before it.

at the conclusion therein that "[an] employer [may] prosecute both the employer and employee portion claims without regard to the provisions of the regulations on adjustment, repayment or consent" where the refund sought was disputed by the government.[14] Pltf's Response to Deft's Motion to Dismiss at 19. What the Federal Circuit did say was that where the employer is the *only* party to pay FICA taxes (*i.e.*, the employer did not withhold FICA amounts from the employees' pay, but rather, paid both portions itself so that the employees' pockets were not affected), the regulations requiring prepayment or consent do not apply.

> Moreover, to apply the regulation would be unreasonable under these circumstances. . . . The Bank should not be required to state that it "repaid" the taxes to its employees since there is no reason for it to repay taxes it never collected. In addition, securing the written consent of its employees should not be required given that the employees never paid the taxes in the first place. They had no interest in the Bank's gaining a refund.

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[14] Whether the government chooses to waive enforcement of its own regulations or not, a court may not do so out of simple considerations of logic or "the most sensible result," as plaintiff urges.

> Treasury regulations are reviewed with great deference. They "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." Thus, we review 26 C.F.R. § 31.6402(a)-2 with deference, and apply the regulation and the agency's interpretation of it as long as it "implements the congressional mandate in some reasonable manner."

First Nat'l Bank, 964 F.2d at 1139-40 (citations omitted).

First Nat'l Bank, 964 F.2d at 1141-42. The portion of the opinion that taxpayer quotes in its response makes *First Nat'l Bank* at least inapplicable to this case; and at most, it supports the government's case.[15] Whereas First National Bank in fact paid the FICA tax liability for its employees, CMC's employees here at bar paid their own RRTA liability through withholding.

The three cases cited by the parties that allowed refund claims or suits for the employer's portion only or for both portions without prepayment to or consent by the employees are, therefore, factually distinguishable from the case at bar and are of no avail to plaintiff. In *First Nat'l Bank*, the bank provided free lunches to its workers for its own convenience. While the IRS did not dispute that the value of the lunches was excludable from the employees' gross income,[16] it asserted that the meals were includable in FICA wages for determining FICA

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[15] The Federal Circuit did not have before it the question of whether an employer's portion refund claim required an employee's portion as well.

> The amount at issue also includes the employer's portion of FICA taxes paid pursuant to 26 U.S.C. § 3111. It is conceded that the Bank's entitlement to a refund of the employer taxes is dependent upon its entitlement to a refund of the employee taxes. Thus, our attention is directed solely to the Bank's entitlement to a refund of the employee taxes.

First Nat'l Bank, 964 F.2d at 1139 n.4. While not providing precedent of substantial weight to rely on, it should be noted that the Federal Circuit did not take issue or even question the Bank's concession.

[16] I.R.C. § 119 allows meals provided free to employees to be excluded from their gross wages if the meals are furnished for the convenience of the employer and on the employer's business premises. 26 U.S.C. § 119(a) (1988).

withholding and employer contribution. The bank paid the FICA taxes for itself and for its employees without withholding any money from the employees' paychecks. The tax payment made on the employees' behalf was included on each individual W-2 Form (Wage and Tax statement) as taxable income. The bank then also paid the additional income taxes resulting from the FICA tax payment, so that each employee would receive the same take-home pay as before the assessment. The bank filed a timely claim for refund of both portions and filed suit after the IRS denied the claim. In holding that the employer was entitled to a refund of the employee tax portion,[17] the Federal Circuit focused on the language of the regulations. Treas. Reg. § 31.6402(a)-2 required refunds to or consents from employees for FICA taxes *collected from an employee*. Since the bank paid all taxes without ever withholding any amounts from its employees and took steps to ensure that the employees' take-home pay remained constant, the court held that no amounts were "collected" from the employees. Accordingly, that court held that the regulation's purpose would not be served by enforcing its requirements, since the employees could never receive a refund of any taxes which they had not paid in the first instance. Those facts are not the facts at bar.

To a similar effect is *Hotel Conquistador*. There, the Court of Claims allowed a refund to the employer for both portions of the FICA deficiency paid to the government which were paid *solely* by the employer without withholding. However, the court dismissed the petition for refund of the FICA taxes for

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[17] *See supra* note 15.

which the taxpayer had withheld the employees' portion from their paychecks. In that connection, the court declined to consider the hotel's protest of the previously paid FICA tax as an informal claim for refund because the taxpayer failed to include the employees' portion of the tax in its refund claim.

Lastly, the Court of Claims found jurisdiction in *Hospital Data*, notwithstanding the fact that the taxpayer brought suit for refund of only the *employer's* portion of social security taxes withheld and paid. However, the court noted there that the taxpayer had in fact complied with all applicable regulations regarding claiming refunds on behalf of its employees for the taxes which it had overwithheld from them, namely that the employer had first secured the employees' written consents to allowance of the refund.

None of the established exceptions to the regulations as explicated in the above-cited cases apply to plaintiff's case at bar. By its own admission, CMC did not pay its employees' RRTA tax liability out of its own pocket, but rather, paid only for itself. According to its amended complaint, the trustee initially withheld (what it considered to be at that time) the proper amount of employment taxes from its payment of the asset sale proceeds to the employees. For the second installment payment of the sales proceeds, CMC Real Estate, successor to the trustee and Railroad, followed the same procedure, withholding the proper amount of tax from the employees' proceeds payments. Since the employees for which CMC claims a refund paid their own tax liability through withholding by CMC's predecessors in interest, taxpayer cannot bring itself within the scope of the narrow exception to §§

31.6402(a)-2 and 31.6413(a)-1. Accordingly, the regulations requiring protection of the employees' interests by either repayment or written consent apply, and plaintiff's failure to satisfy either element is, therefore, fatal to its claim and suit for refund of its own portion as well.

Plaintiff also contends that its situation is sufficiently analogous to other cases that have held the regulations applicable to various fact scenarios but did not enforce the regulations to the letter or did not require compliance with regard to those *employees no longer connected to* or with the company. While plaintiff is correct that the door permitting exceptions to full compliance with the regulations has been left slightly ajar by other cases, taxpayer's fact scenario is singularly appropriate for warranting full compliance with the administrative prerequisites to the filing of a refund claim or suit.

CMC seizes upon specific language in three cases in support of its contention. First, taxpayer quotes from *Entenmann's*:

> Where it is "impossible or too expensive" to locate the employees the government agrees that the overpayments "cannot be adjusted" and that a refund under Section 6413(b) is appropriate.
>
> ******
>
> As ordinarily understood an "adjustment" may be made in more than one way, as the Latin derivation of the word makes manifest. An adjustment sets things right. The affairs of an employer and one who has

> performed work for him may be set in order even though the employment has ceased and there are no future payments in which the adjustment may be reflected. . . .
>
> Under the philosophy of the *Atlantic Dept. Stores, Inc.* case plaintiff, before it can claim a refund of its share of the taxes must make a reasonable effort within the applicable period to "adjust" the overcollection and overpayment of the employees' share. *At a minimum this means mailing an appropriate letter to an employee's last known address and asking for return of an appropriate form.* Plaintiff has not taken even this step.

Id. at 1119, 1120 (emphasis added). Evidently, plaintiff looks to the court's "minimum requirement" in the last sentence and takes that to mean that it can mail a simple letter to its former employees apprising them of the error and instructing them to claim their own refunds. In light of the previous discussion concerning judicial ability to waive statutory and regulatory requirements, the *Entenmann's* court could not have intended its statement to carry with it the meaning that plaintiff attempts to attach to it.

The regulations themselves speak in absolutes. Treas. Reg. § 31.6402(a)-2 speaks to "every claim" by an employer needing proof of repayment or consent, and § 31.6413(a)-1 states that the employee "shall" be repaid. *Atlantic* and its progeny, however, realized that practical considerations might warrant certain allowances. For example, if former employees were unable to be found after a reasonable search, no point would be

served by denying an employer its refund if attempted substantial compliance with the regulations resulted in failure. With that and the duty to apply the regulations in mind, the *Entenmann's* court, in using the phrase "appropriate letter," must have meant a form or letter for the employee to sign and return to the employer giving consent to allowance of the refund. If there is any doubt, that court's use of the subsequent phrase "asking for the *return* of the appropriate *form*" removes it. By "minimum," therefore, the *Entenmann's* court could not have meant that that is all which must be done in all cases. But if circumstances dictate, as where the employer has no idea of where to locate the employee, it may suffice.

Conveniently, taxpayer hospitably omitted the last sentence from the middle paragraph quoted above, *i.e.*, "Certainly Congress recognized in the 1939 enactment that it was 'possible' to make an 'adjustment' [even] where the employee's connection with the employer had been 'severed.'" *Id.* at 1120. Taken with the portion of the opinion quoted by CMC in its opposition to defendant's motion, the propriety of the above analysis and taxpayer's misinterpretation is apparent.

Plaintiff also states that *Atlantic* "specifically refers to making a claim on behalf of the *current employees* only as being satisfactory, presumably even if no consents were provided." Pltf's Response at 14-15. Again taxpayer reads a meaning that would be judicially impermissible into the phraseology of a court. The *Atlantic* court's statement to which plaintiff refers is: "[W]e find that the existing statutes and regulations clearly imply an obligation on the part of the employer to claim a refund or credit on behalf of those

employees with respect to whom the employer can reasonably adjust its overpayment." *Atlantic*, 557 F.2d at 659. Obviously, the *Atlantic* court was referring to claiming a refund within the guideline of the regulations. To imply otherwise would defy reason.

CMC then goes on to state that "[t]he language of the *Macy's* case also indicates that this [*i.e.*, asserting claim only for current employees] may have [also] been sufficient." Pltf's Response at 15. The portion of the opinion plaintiff offers in support of its contention lends no credibility to its statement.[18] Conversely, the portions of the *Macy's* opinion not offered by taxpayer directly contradicts its position—

> [In *Atlantic Dep't Stores*], the court recognized that since it is the employer's responsibility to collect FICA taxes from its employees, the employer is usually at fault when an overpayment is made. The employer, moreover, is in the better position to discover and remedy any such mistake, and any costs

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[18] In support of its assertion, CMC quoted the opinion as follows:

> Both the time remaining before a claim is timebarred and the time necessary to effect the required employees' adjustments, however, are factors directly within the employer's control. An employer who discovers its mistake too late, or whose adjustment procedure is too slow to permit timely correction of its employees' overpayment, should not profit from its error by being permitted to file its own refund claim while wholly avoiding the possibly substantial expense of employee adjustment.

Macy's, 484 F. Supp. at 183. This statement in no way supports CMC's contention.

> involved in adjusting the overpayment of innocent employees should be borne by the erring party. It follows, therefore, that *where adjustment is not reasonably possible because a former employee cannot be located* or for some other reason not within the employer's control, no purpose would be served by prohibiting the employer from filing its own claim.

Macy's, 484 F. Supp. at 182 (emphasis added).

3. *Factual Analysis Of The Instant Case.*

The facts of the case at bar, on this indisputable record, do not warrant giving CMC the benefit of a lenient application of the regulations, so that it may maintain this suit in the face of less than full compliance. Although plaintiff strenuously argues that its particular circumstances are deserving of relaxed enforcement of the Secretary's rules, we do not agree. In essence, the very facts that plaintiff proffers in support of excused compliance, based on equitable considerations, serve as the platform from which the government's position is fortified.

Taxpayer claims that it would be an unfair burden for it to have to track down approximately 8,000 employees with whom it has not had contact for three years prior to ascertaining the error. The record shows that, after the asset sale to Soo, taxpayer was required to pay a portion of the proceeds to Railroad's former employees, which it did. Whether plaintiff paid each former employee individually or all at once through an intermediary, such as the involved unions, it managed to accomplish its task. Whatever method it used, it would not have

been unduly burdensome for plaintiff to follow the same path to attempt contacting its affected employees. As the *Entenmann's* court observed, plaintiff could, at least, sent a letter to each employee requesting the return of an enclosed consent form. For those returned, plaintiff would have known those persons' whereabouts with minimal effort and expense.[19] For those not returned, plaintiff could at least have offered its effort to the government as a good faith attempt at compliance with the regulations. Even if the government had not accepted that, a court would then be in a position to consider whether fundamental fairness demanded treatment of the attempt as

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[19] In *Atlantic*, the parties stipulated—that the average overpayment per employee was $4.83; that the estimated cost to Atlantic of computing the amount of overcollection and refunding the amount by mail would be $2.25 for those employees whose location was known and were cooperative; and that for those employees whose whereabouts were not known or were uncooperative, the cost of repayment could exceed the amount of the refund. *Atlantic*, 557 F.2d at 958. In the case at bar, the aggregate withheld employee portions of RRTA tax is $3,839,803.70 ($2,471,822.48 + $1,367,981.22), and approximately 8,000 former employees are affected by the alleged overpayment. Therefore, the amount of refund per employee would be roughly $486 ($3,839,803.70 ÷ 8000). Plaintiff has made no offer as to what its estimated compliance cost per employee would be. However, it is logical to assume that to mail consent forms and/or checks to its former employees, the cost could not be greatly in excess of that stipulated by the parties in *Atlantic*. But even if it were, the *Atlantic* court declined to excuse the taxpayer from its duty where the cost of providing the refund was nearly half of the amount of the benefit to the employees. Certainly CMC's per employee refund cost could not reach those proportions, but if it did, plaintiff would still have to comply with the regulations in order to maintain a refund suit. Under the rationale of all of the cases discussed herein, we are constrained to conclude that since it was CMC's fault that the employees overpaid their RRTA taxes, it should fully comply with the regulations and established precedence.

deemed compliance, without impermissibly ignoring congressional mandate and statutory authority. Success is not a *sine qua non* of satisfying the regulations, but rather, a good faith attempt and a showing of undue burden or clear impracticability certainly is.

Moreover, plaintiff stated that most of Railroad's former employees continued to work for Soo after the asset sale. Given this concession, it would, of course, have been very easy and administratively inexpensive to contact them at or through Soo. Even if all of the employees could not have been reached there, certainly a large number might have been. Taxpayer could have then attempted other reasonable methods to reach the remainder. For instance, CMC could have mailed the previously discussed correspondence to the last known home address of those employees not yet contacted. Indeed, CMC could have done this for all of the former employees without ever using the unions or Soo as an intermediary. Instead, plaintiff chose to do nothing but claim for the employees' portion without satisfying the *mandatory* precondition imposed by the regulations.

Plaintiff also states that, upon payment to the employees of their portion of the asset sale proceeds, it notified them that the taxes withheld might be in excess of their taxable wage base and instructed them to claim refunds of any excess taxes paid through credits on their individual income tax returns.[20/] Further, taxpayer claims, without knowing (because it claims

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[20/] Plaintiff claims that it did not have any information on the employees' RRTA taxable wage base for the period in which the sale proceeds payments were made and respective taxes already withheld.

"upon information and belief"), that because most of Railroad's former employees continued to work for Soo after the asset sale, it is likely that most, if not all, of the affected employees have already received a credit for their overpayment. In its refund claim proceeding, plaintiff furnished the IRS with the names of its former employees and requested that the Service use such information to determine which, if any, of the individuals had claimed and received credits.

The fact that plaintiff told its employees to investigate their tax situation is irrelevant, and fails to comply with its explicit obligations under the regulations. Moreover, taxpayer cannot satisfy its obligation to comply with the applicable regulations,[21] that it either refunded the tax or obtained consent from the employees, by shifting the burden to the IRS.[22] The directions contained in the regulations more than imply that the explicit burden rests on the employer to prove that it has refunded the overpaid tax in the case of reimbursement; and where the option to obtain written consent is exercised, the burden would likewise obviously be on the employer. The administrative

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[21] Even if plaintiff was complying with the spirit of the regulations, Justice Holmes' statement in *Rock Island, Arkansas & Louisiana R.R.*, quoted *supra*, at 6, makes clear that anything less than strict compliance with the letter of the conditions placed on the waiving of sovereign immunity is unacceptable.

[22] 26 C.F.R. § 31.6402(a)-2(a)(2) directs the employer claiming the employees' share of RRTA tax to "include a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee. . . ." 26 C.F.R. § 31.6413(a)-1(b)(1)(ii) instructs the employer to "keep as part of his records the written receipt of the employee, showing the date and amount of the repayment."

holocaust that would be imposed upon the IRS by a shifting of the burden, if the regulations required each employee to individually pursue his or her refund, is manifest. Therefore, we hold that CMC's action is merely supplying names to the IRS for verification of credits received cannot suffice to satisfy the regulation's mandate.

Contrary to its contention, we further hold that plaintiff has failed to take all reasonable steps to protect its former employees' interests and comply with the obligatory regulations. Even if, as plaintiff states, it would be unfair for the taxpayer to have to reimburse the employees prior to filing a claim where there was no guarantee of plaintiff's own recovery because the government disputed the overpayment, CMC had the option to utilize the alternative method provided by the Secretary, *i.e.*, to obtain or show its attempt to obtain the employees' written consents. In that way, plaintiff would not have to risk non-recovery of the reimbursed tax. It also failed to comply in this regard.

CONCLUSION

Because plaintiff filed suit to recover the foregoing employer and employee taxes alleged to have been erroneously overpaid without having filed claims with the Secretary, as explicitly required by § 7422(a) of the Code, defendant's motion to dismiss for lack of subject matter jurisdiction is hereby GRANTED. Therefore, plaintiff's amended complaint is hereby DISMISSED WITH PREJUDICE. The Clerk shall enter judgment accordingly. No costs.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 2, 1998.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: June 25, 1998

By /s/ Alex Van Veen
Alex Van Veen
Staff Law Clerk